No. 97-501-CFX Title: Randall Ricci, Petitioner
v.
Village of Arlington Heights

Docketed: September 19, 1997 Court: United States Court of Appeals for the Seventh Circuit

Entry	Date	Proceedings and Orders
	Sep 17 1997	Petition for writ of certiorari filed. (Response due October 19, 1997)
	Oct 20 1997	Waiver of right of respondent Village of Arlington Heights to respond filed.
	Oct 22 1997	DISTRIBUTED. November 7, 1997
	Oct 27 1997	Response requested.
	Nov 26 1997	Brief of respondent Village of Arlington Heights in opposition filed.
	Dec 10 1997	REDISTRIBUTED. January 9, 1998
	Jan 9 1998	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, February 23, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 25, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, April 10, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT April 21, 1998.
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	Feb 17 1998	Brief amicus curiae of Americans for Effective Law Enforcement, Inc. filed.
	Feb 20 1998	Joint appendix filed.
	Feb 20 1998	Brief of petitioner Randall Ricci filed.
	Feb 23 1998	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Feb 23 1998	Brief amicus curiae of Institute for Justice filed.
	Feb 23 1998	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Mar 16 1998	CIRCULATED.
	Mar 25 1998	Brief amici curiae of National League of Cities, et al. filed.
	Mar 25 1998	Brief of respondent Village of Arlington Heights filed.
	Mar 25 1998	Brief amicus curiae of United States filed.
	Mar 27 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Apr 2 1998	Record filed.
	Apr 6 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Apr 10 1998	Reply brief of petitioner Randall Ricci filed.
	Apr 20 1998	Record filed.
	Apr 21 1998	ARGUED.
	May 4 1998	Writ of certiorari DISMISSED as improvidently granted.

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No. 97-___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

RANDALL RICCI,

Petitioner,

v.

VILLAGE OF ARLINGTON, HEIGHTS
A MUNICIPAL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner

19 pp

QUESTIONS PRESENTED

1. Does the reasonableness clause of the Fourth Amendment incorporate the common law rule prohibiting warrantless arrests in misdemeanor cases that do not involve a breach of the peace?

2. May a municipality, consistent with the reasonableness clause of the Fourth Amendment, require its police officers to make full custodial arrests for an alleged violation of a fine only license ordinance "in order to ensure compliance with the ordinance?"

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TABLE OF AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioner Randall Ricci respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 20, 1997.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-9) is reported at 116 F.3d 288. The opinion of the district court (App. 11-19) is reported at 904 F.Supp. 828.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 10) was entered on June 20, 1995.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States.

STATEMENT

On April 19, 1994, two police officers of respondent Arlington Heights, Illinois arrested petitioner at his place of business and charged him with operating a business without a license, in violation of a fine-only municipal ordinance.[1]

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1. Plaintiff is the principal of a telemarketing firm. Section 14-3001 of the Arlington Heights Village Code provides that "businesses hereinafter enumerated in Section 14-3002 shall be licensed in accordance with the provisions of this Code." Section 14-3002 contains an extensive list of businesses and includes a catch-all provision covering "[a]ny and all business enterprises not named elsewhere in this Code."

(App. 15.) As required by a municipal policy,[2] the officers transported plaintiff to the police station where they locked him into an interrogation room for about an hour. (App. 12.) While plaintiff was in police custody, his spouse obtained the business license (id.) and the ordinance charge was dismissed at plaintiff's first court appearance. (Id.) Following the conclusion of the state court proceedings, petitioner brought an action against the arresting officers and Arlington Heights under 42 U.S.C. §1983 in the district court.

One of petitioner's claims in his civil right complaint was that respondent's policy of requiring full custodial arrests for violation of its fine-only business license ordinance resulted in an unreasonable seizure under the Fourth Amendment.[3] (Complaint, par. 5.) Petitioner argued that a full custodial arrest for a fine-only ordinance violation not involving a breach of the peace is unreasonable under the Fourth Amendment.

Petitioner argued in the district court that his business was not subject to the licensing ordinance. The district court resolved this issue against petitioner. (App. 15-16.) Petitioner does not arise any question involving the applicability of the ordinance in this Court.

2. Respondent admitted the existence of the challenged policy in the district court. (App. 12.)

3. Petitioner also asserted that he had been arrested without probable cause and that, before arresting him, the individual officers had conducted an unreasonable search of petitioner's business. The district court found against petitioner on the probable cause to arrest issue. (App. 15-16.) Neither claim is at issue in this proceeding: petitioner did not challenge the probable cause ruling on appeal and the parties settled the unreasonable search claim.

The district court found that the arresting officers had visited petitioner's business "to gather evidence to put him out of business," (App. 14), but concluded that "the Village policy requiring custodial arrests for violations of its business-license ordinance does not offend the Fourth Amendment." (App. 19.)

The court of appeals affirmed, holding that a municipality may require full custodial arrests for violation of a fine only business license ordinance to "prevent[] Ricci from continuing to violate a law" (App. 7) and "in order to ensure compliance with the ordinance and in order to complete the necessary paperwork." (Id.) In the view of the Seventh Circuit, petitoner could not complain about the reasonableness of his arrest because "a neutral magistrate following Illinois law would surely have issued a warrant in this case."

REASONS FOR GRANTING THE WRIT

The Court has yet to decide on whether the common law rule prohibiting warrantless arrests in misdemeanor cases that do not involve a breach of the peace is part of the reasonableness requirement of the Fourth Amendment. As Mr. Justice Stevens noted in *Robbins v. California*, 453 U.S. 420 (1981) (dissenting opinion), "the Court has not directly considered the question whether 'there are come constitutional limits upon the use of "custodial arrests" as the means for invoking the criminal process when relatively minor offenses are involved.'"[4] 453 U.S. at 450 n.11.

A warrantless arrest "is a species of seizure required by the [Fourth] Amendment to be reasonable." *Payton v. New York*, 445 U.S. 573, 585 (1980). Although the Court has

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4. Quoting 2 W. LaFave, Search and Seizure, §5.2, p. 290 (1978).

held that a warrantless arrest in a public place is constitutionally reasonable if the arresting officer has probable cause to believe the suspect is a felon, *United States v. Watson*, 423 U.S. 411, (1976), the Court has not considered whether the common law rule permitting warrantless arrests for misdemeanors only "to suppress breaches of the peace."[5] is part of the reasonableness calculus.

In his concurring opinion in *Gustafson v. Florida*, 414 U.S. 260 (1973), Mr. Justice Stewart observed that "[i]t seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments." 414 U.S. at 266-67 (concurring opinion). The motorist in *Gustafson*, however, had conceded the reasonableness of his custodial arrest for a minor motor vehicle violation.

Justice Stewart's concerns in *Gustafson* are rooted in the common law rule that, without a warrant, a police officer could not make an arrest for a non-felony offense unless the offense involved a breach of the peace. 2 LaFave, *Search and Seizure* (1996), §5.1(b), p. 13. A peace officer at common law had "no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence." *Halsbury's Laws of England*, vol. 9, part. III, 612, cited in *Carroll v. United States*, 267 U.S. 132, 156 (1925),

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5. *Carroll v. United States*, 267 U.S. 132, 156-57 (1925), citing 1 Stephen, *History of Criminal Law*, 193.

Respondent's municipal policy requiring custodial arrests for violation of its fine-only business license ordinance is not intended to suppress any breach of the peace; rather, as the Seventh Circuit observed, respondent requires full custodial arrests "in order to ensure compliance with the ordinance and in order to complete the necessary paperwork" (App. 7.)

Vesting a police officer with the power to make a warrantless arrest to "ensure compliance" is a step to a police state — the power to make arrests to "ensure compliance" makes the arresting officer the prosecutor and judge in a summary prosecution for an alleged violation of a fine-only ordinance. This broad and unregulated power undercuts the role of the Fourth Amendment of preserving "one of the most fundamental distinctions between our form of government, where officers act under the law, and the police state where they are the law." *Johnson v. United States*, 333 U.S. 10, 17 (1948).

The central purpose of the Fourth Amendment was to curb the discretion vested by "general warrants: that placed "the liberty of every man in the hands of every petty officer." *Boyd v. United States*, 116 U.S 616, 625 (1886), quoting the remarks of James Otis. This is precisely the result of the rule adopted by the Seventh Circuit in this case, which authorizes police to make full custodial arrests "to ensure compliance" (App. 7.)

An arrest — even one "to ensure compliance" — "is abrupt, is effected with force or threat of it, and often in demeaning circumstances." *United States v. Dionisio*, 410 U.S. 1, 10 (1973). "An arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends." *United States v. Marion*, 404 U.S. 307, 320 (1971). An arrest made solely "to ensure compliance with the

ordinance" flouts core principles of the Fourth Amendment.

The federal courts of appeals which have considered this issue have reached conflicting results. In *United States v. Mota*, 982 F.2d 1384 (9th Cir.1993) the defendants had been arrested for selling hot corn-on-the-cob from a shopping cart without a required license; the Ninth Circuit held that the reasonableness standard of the Fourth Amendment did not permit a full custodial arrest for this fine only offense. Id. at 1389.

Three years before *Mota*, another panel of the Ninth Circuit stated as black latter law the proposition that an arrest without warrant may be made for "*any offense.*" (emphasis in original) *Higbee v. City of San Diego*, 911 F.2d 377, 379 n.2 (9th Cir. 1990) (cited by the court below at App. 6). The Fourth Circuit has likewise held that full custodial arrests are permissible under the Fourth Amendment for violation of fine-only ordinance violations which do not involve a beach of the peace. *Fisher v. Washington Metro. Area Transit Authority*, 690 F.2d 1133, 1139 n. 6 (4th Cir. 1982).

The state courts have reached varying answers to this question. For example, in Illinois, a municipality may authorize its police officers to make full custodial arrests for violation of an ordinance punishable by fine only. *People v. Edge*, 406 Ill. 490, 94 N.E.2d 359, 363 (1950). The same rule is followed in Wisconsin. *City of Milwaukee v. Nelson*, 149 Wis.2d 434, 439 N.W.2d 562, 570 (1989)

In Indiana, custodial arrests are not permitted for violation of fine only offenses. *State v. Pease* 531 N.E.2d 1207, 1212 (Ind. Ct. of Appeals 1988). Police in Florida may not make custodial arrests for violation of an ordinance requiring that all bicycles be equipped with gongs. *Thomas v. State*, 614 So.2d 468, 470-71 (Fla. 1993). See also *Barnett v. United States*, 5[redacted] A.2d 197, 199 (D.C. 1987) (no custodial arrest for "walking so as to create a hazard"); *State v. Hehman*, 90 Wash.2d 45, 578 P.2d 527, 529 (1978) (no custodial

arrest for minor traffic violation). *Commonwealth v. Wright*, 158 Mass. 149, 33 N. E. 82 (1893) (no custodial arrest for unlawful possession of undersized lobster).

This Court has made plain that common-law principles of arrest are relevant to the Fourth Amendment, *Wilson v. Arkansas*, 115 S.Ct. 1915 (1995), especially to questions of "reasonableness." *Whren v. United States*, 116 S.Ct. 1769, 1777 (1996). Certiorari should be granted in this case to resolve the important and undecided question of whether the common law rule prohibiting warrantless arrests in misdemeanor cases that do not involve a breach of the peace is part of the reasonableness requirement of the Fourth Amendment.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

September, 1997

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-2229

RANDALL RICCI,

Plaintiff-Appellant,

v.

VILLAGE OF ARLINGTON, HEIGHTS
A MUNICIPAL CORPORATION,
ANDREW WHOWELL and JEROME LEONARD

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 C 7732 **Elaine E. Bucklo,** *Judge.*

ARGUED DECEMBER 2, 1996--DECIDED JUNE 20, 1997

Before CUMMINGS, EASTERBROOK and ROVNER, Circuit Judges,

ROVNER, Circuit Judge. Randall Ricci was arrested for operating a business without a license, in violation of an Arlington Heights, Illinois ordinance. He subsequently sued the Village of Arlington Heights and the two arresting officers pursuant to 42 U.S.C. sec. 1983, claiming the defendants violated his civil rights by subjecting him to full custodial arrest for violation of a fine-only ordinance. Because we find the arrest reasonable for Fourth Amendment purposes, we affirm the district court's grant of summary judgment in favor of the defendants.

I. BACKGROUND

Ricci owns Rudeway Enterprises, a telemarketing business that sells advertising and conducts fundraising for the Combined Counties Police Associations, an Illinois labor union. In early 1994, the Arlington Heights police department began receiving complaints from citizens who were the targets of telephone solicitations conducted by Ricci's business. Detective Whowell investigated Rudeway and determined that Ricci lacked the business license required by Village ordinance. Whowell also discovered an outstanding warrant for the arrest of one of Ricci's employees. Thereafter, Whowell and fellow officer Jerome Lehnert[1] went to Ricci's place of business and arrested the employee pursuant to the warrant. At the same time, according to facts alleged by Ricci and undisputed by the defendants. the officers searched some of Ricci's business papers, even though they had no warrant to do so, in hopes of finding material that would allow them to close down Rudeway. The officers then asked Ricci if he had a business license and he confirmed that he did not. The officers arrested Ricci for violating Section 9-201 of the Village of Arlington Heights Code of Ordinances, which makes it unlawful to operate a business without a license.

Pursuant to Village policy, Ricci was taken to the Arlington Heights police station and locked in an interview room for approximately one hour while the officers prepared

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1. Plaintiff apparently misspelled Officer Lehnert's name in the complaint and the error was never corrected. We will use the correct spelling.

1. Section 14-3002 of the Village of Arlington Heights Code of Ordinances requires local businesses to be licensed through the Village.

an arrest sheet and a Local Ordinance Complaint, and approved and issued a bond receipt. After the paperwork was completed, Ricci was released on a recognizance bond. His wife obtained the business license while he was in custody, and when his case came to court, the charges were dismissed upon presentation of the newly obtained license. According to Ricci, the police knew when they arrested him that he would be released on bond, that he would purchase a business license, and that the charges would be dismissed.

Ricci brought a three count complaint against the Village of Arlington Heights and the police officers who arrested him, alleging that the officers engaged in an unconstitutional search of the premises, arrested him without probable cause, and violated his civil rights by subjecting him to full custodial arrest for committing a fine-only offense. The parties settled the first claim, and Ricci does not appeal from the court's dismissal with prejudice of the second claim. Thus, the only claim before us is the one attacking the Village policy that requires full custodial arrest for violations of the business license ordinance.

The district court dismissed that claim, noting that the only two circuits to rule on the issue both found custodial arrests for local ordinance violations to be constitutionally acceptable. See *Fisher v. Washington Metropolitan Area Transit Authority*, 690 F.2d 1133 (4th Cir. 1982) (refusing to find unconstitutional an arrest for violation of a fine-only ordinance prohibiting eating on trains); *Higbee v. City of San Diego*, 911 F.2d 377 (9th Cir. 1990) (finding constitutionally permissible the detention for processing of misdemeanor arrestees who were operating a "peep show" in violation of local ordinance, even though officers could have issued field release citations under city policy). Further, the district court found, the result would be the same under the common law rule that an officer could make a custodial arrest for a misdemeanor only if the crime was committed in the officer's presence. Here, Ricci admitted to the police that he did not

have the requisite business license, and thus the misdemeanor was committed in the officers' presence. Finally, the district court declined to apply Justice Stewart's suggestion, expressed in a concurrence, that a custodial arrest for a misdemeanor--in that case a minor traffic offense--might violate a person's rights under the Fourth and Fourteenth Amendments. *See Gustafson v. Florida*, 414 U.S. 260, 266 (1973) (Stewart, J., concurring). The district court noted that the Supreme Court had not adopted an interpretation of reasonableness under the Fourth Amendment that required the court to consider the permitted punishment in determining whether an arrest was reasonable, and the court declined to impose that interpretation without further guidance from the Supreme Court. In so deciding, the district court joined with the Fourth Circuit which also refused to apply such an interpretation to the reasonableness test until the Supreme Court required it. *Fisher*, 690 F.2d at 1139 n.6.

On appeal, Ricci argues that under the common law, full custodial arrest for violation of a fine-only ordinance is constitutionally permissible only if the violation involves a breach of the peace. The Village, in turn, contends that where probable cause exists to believe a crime is being committed, and where state law authorizes arrest for the violation, an arrest is reasonable under the Fourth Amendment.

II. DISCUSSION

We have previously held, in the context of a discussion about pretextual arrest, that the reasonableness of an arrest depends on the existence of two objective factors:

> First, did the arresting officer have probable cause to believe that the defendant had committed or was committing an offense. Second, was the arresting officer authorized by state and or municipal law to effect a custodial arrest for the particular offense. If these two factors are present, we believe that an arrest is necessarily reasonable under the fourth

> amendment. This proposition may be stated in another way: so long as the police are doing no more than they are legally permitted and objectively authorized to do, an arrest is constitutional. *United States v. Trigg*, 878 F.2d 1037, 1041 (7th Cir. 1989).

Ricci does not dispute that the officers had probable cause to believe he was violating the business license ordinance. He did, after all, admit to the arresting officers that he did not have the license, and the police had already confirmed that fact through independent investigation. Nor does Ricci dispute that the arresting officers were authorized by state or local law to effect custodial arrest for this particular offense. Illinois law authorizes a peace officer to arrest a person when the officer "has reasonable grounds to believe that the person is committing or has committed an offense." 725 ILCS 5/107-2(1)(c). The Illinois law does not differentiate between offenses punishable by fine only and offenses punishable by a possible (or certain) term of imprisonment. Village policy also authorized the arrest in order to effectuate the processing of the paperwork associated with a bondable offense. Under the two-pronged test described in Trigg, the arrest would, therefore, pass constitutional muster.

But Ricci argues that the common law requires a different result, in essence adding a third prong to the Trigg test. He contends that the court should also weigh the severity of the punishment associated with the offense and should consider whether the offense at issue constituted a breach of the peace. In the case of an offense punishable by fine only, where the offense does not constitute a breach of the peace, Ricci contends we should adopt a per se rule that such arrests are unreasonable for Fourth Amendment purposes. In support of this new rule, Ricci cites *Gramenos v. Jewel Co.*, 797 F.2d 432 (7th Cir. 1986), *cert. denied*, 481 U.S. 1028 (1987), where we recognized that full custodial arrest for any crime on probable cause might not comport with the Fourth Amendment. We noted in *Gramenos* that under the common law, an officer could make a custodial arrest for a

misdemeanor only if the crime was committed in the officer's presence. 797 F.2d at 441. We also noted that Illinois had altered the common law rule to allow full custodial arrest for any crime on probable cause, whether or not the offense was committed in the officer's presence. But because the arrestee in that case did not challenge the Illinois law that authorized arrests for misdemeanors, we declined to rule on the constitutional propriety of the Illinois statute.

The arrest in the instant case comports with the common law rule as stated in *Gramenos*. That is, Ricci committed the offense in the officers' presence. But Ricci also contends that the common law allowed arrest for a misdemeanor committed in an officer's presence only if that crime constituted a breach of the peace. Because operating a business without a license does not constitute a breach of the peace, Ricci argues, full custodial arrest is not reasonable under the Fourth Amendment. But the common law rule has been relaxed to include arrests for offenses other than breaches of the peace. *Higbee*, 911 F.2d at 379 n.2 (arrest for operating a

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1. In addition to *Gramenos*, Ricci cites *Commonwealth v. Wright*, 158 Mass. 149, 33 N.E. 82 (1893). In that case, the defendant was arrested without a warrant for the misdemeanor offense of possessing undersized or so-called "short" lobsters with intent to sell. The court held, "We are . . . of [the] opinion that for statutory misdemeanors of this kind, not amounting to a breach of the peace, there is no authority in an officer to arrest without a warrant, unless it is given by statute." 158 Mass. at 158-59, 33 N.E. at 86. First, as we discuss below, Ricci does not complain about the failure of the officers to procure a warrant. Rather, he complains about the reasonableness of any arrest for a fine-only offense. Second, the parties agree that there was statutory authority in the instant case allowing the officers to arrest Ricci for violating a Village ordinance.

"peep show"). *See also, Fisher*, 690 F.2d at 1139 n.6 (arrest for eating on a train). The rationale for allowing warrantless arrests for breaches of the peace was to promptly suppress breaches of the peace. Here the arrest served a similar purpose. The arrest prevented Ricci from continuing to violate a law he had been admittedly violating for some time.

No variation of the common law rule requires that we consider the severity of the punishment in deciding if the arrest was reasonable. Nor, as the district court noted, has the Supreme Court adopted an interpretation of reasonableness under the Fourth Amendment that would require this Court to consider the permitted punishment in determining whether an arrest was reasonable. Nonetheless, we note that Ricci was accumulating fine liability at a rate between $5 and $500 per day during the period of violation, which he admitted had been going on for an extended period of time. See Village of Arlington Heights Code of Ordinances, section 9-201 ("Any person violating this section shall be fined not less than Five Dollars ($5.00) nor more than Five Hundred Dollars ($500.00) for each offense. A separate offense shall be deemed committed on each day during or on which a violation occurs or continues.") By the time he was arrested, Ricci was facing a potential fine of tens of thousands of dollars. He admitted to the officers that he was currently violating the statute. The officers held him for only one hour, the length of time it took to process the paperwork associated with the arrest. We cannot call such an arrest unreasonable for Fourth Amendment purposes. The Village of Arlington Heights was entitled to arrest Ricci in order to ensure compliance with the ordinance and in order to complete the necessary paperwork.

Moreover, we decline to set a per se rule for deciding the reasonableness of an arrest for Fourth Amendment purposes. Such an approach conflicts with the Supreme Court's analysis in *Whren v. United States*, 116 S.Ct. 1769 (1996). In general, every Fourth Amendment case, because it turns upon a reasonableness determination, involves a balancing of all

relevant factors. *Whren*, 116 S.Ct. at 1776-77. Thus, we must consider the unique facts of each case in order to make that determination. It is true that, with rare exceptions, "the result of that balancing is not in doubt where the search or seizure is based upon probable cause. . . . Where probable cause has existed, the only cases in which we have found it necessary actually to perform the conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests." Id. That does not change the individualized assessment we make in each case. But Ricci's arrest, which was based on probable cause, is not one of those extraordinary cases that require us to conduct a balancing analysis.

Two final points: first, at oral argument, Ricci attempted to recast his argument as one based on the warrant clause of the Fourth Amendment, rather than on the reasonableness clause. Ricci contended at oral argument that no neutral magistrate would have issued a warrant in this case. Ricci waived this argument by not raising it in his brief and we therefore need not address it. *United States v. Beltran*, 109 F.3d 365, 371 (7th Cir. 1997) (argument raised for the first time at oral argument waived for purposes of appeal); *United States v. Shorter*, 54 F.3d 1248, 1256 n.19 (7th Cir. 1995), cert. denied, 116 S.Ct. 250 (1995) (argument not raised in brief is deemed waived). Second, Ricci raised a parade of horribles in his reply brief, speculating that under the same rationales proffered by the Village, a municipality could, with impunity, require the use of leg irons, shackles and handcuffs

1. In fact, Ricci conceded at oral argument that had a warrant been issued in this case, the arrest would have been reasonable under the Fourth Amendment. Such a concession eviscerates Ricci's reasonableness argument. Further, a neutral magistrate following Illinois law would surely have issued a warrant in this case.

for misdemeanor arrests, could insist that all misdemeanor arrestees be strip searched and subjected to full body cavity searches, and could order police to "shoot to kill" arrestees, regardless of the offense. Such histrionics do little for the credibility of Ricci's already thin arguments. "It is often possible to parade a list of horribles as to how a criminal statute might unjustly be applied. However, the focus needs to be how it could be properly applied in this case." *United States v. Berry*, 60 F.3d 288, 293 (7th Cir. 1995). None of these things happened to Ricci, and indeed we might have an entirely different case had the police acted in such a manner. But here the police arrested Ricci based on probable cause, brought him to the police station and locked him in an interview room for an hour while they processed the necessary paperwork. They arrested him in compliance with Illinois law and Village ordinances. Today we also hold they did so in conformance with the reasonableness requirement of the Fourth Amendment. Therefore, the order of the district court granting summary judgment in favor of the defendants is

AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-2229

RANDALL RICCI,

Plaintiff-Appellant,

v.

VILLAGE OF ARLINGTON, HEIGHTS
A MUNICIPAL CORPORATION,
ANDREW WHOWELL and JEROME LEONARD

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 C 7732 **Elaine E. Bucklo**, *Judge.*

[June 20, 1997]

JUDGMENT — ORAL ARGUMENT

Honorable Walter J. Cummings, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge
Honorable Ilana D. Rovner, Circuit Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RANDALL RICCI,

Plaintiff,

No. 94 C 7732 *v.*

VILLAGE OF ARLINGTON, HEIGHTS
A MUNICIPAL CORPORATION,
ANDREW WHOWELL and JEROME LEONARD

Defendants.

MEMORANDUM OPINION AND ORDER

Defendants, the Village of Arlington Heights ("the Village") and two of its police officers, Andrew Whowell and Jerome Lehnert, have filed a motion requesting this court to enter summary judgment in their favor on the complaint filed by plaintiff, Randall Ricci. For the reasons stated below, the defendants' motion is denied in part and granted in part.

I. Undisputed Facts

Plaintiff Randall Ricci has filed this action under 42 U.S.C. § 1983, alleging that defendants have violated his rights guaranteed by the Fourth and Fourteenth Amendments. Mr. Ricci makes three separate claims. First, he claims that Officers Whowell and Lehnert engaged in a warrantless search of his business premises.[1] Second, he claims that he

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1. Plaintiff has incorrectly spelled Mr. Lehnert's name in his complaint. The correct spelling will be used in this opinion.

was arrested without probable cause. Finally, Mr. Ricci alleges that the Village's policy prescribing full custodial arrests for violations of its municipal ordinance requiring a business license is unconstitutional. A description of the incident in question follows.

On April 19, 1994, Officers Whowell and Lehnert entered the business premises of Rudeway Enterprises, a telemarketing firm run by Mr. Ricci and located in the Village. The Officers were there to arrest Daniel Dugo, an employee of Rudeway Enterprises for whom they had a warrant. According to Mr. Ricci, they were also there to gather evidence to put him out of business.[2] Whether true or not, defendants admit that prior to going to Rudeway, they had determined that Rudeway did not have a Village of Arlington Heights business license.

After entering the Rudeway business premises, Officer Whowell asked Mr. Ricci whether he had a Village business license for Rudeway Enterprises, as required by the Arlington Heights Village Code of Ordinances ("the Village Code"). Mr. Ricci stated that he did not have a license. Because Mr. Ricci was operating Rudeway Enterprises without a Village business license, he was arrested and taken to the Village Police Department. He was held there for about an hour, while the police performed the necessary administrative functions, and then released on a recognizance bond.

Mr. Ricci's wife ultimately obtained a Village business license for Rudeway Enterprises. The charge against Mr. Ricci was consequently dropped.

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2. This fact is admitted by defendants' failure to respond to Mr. Ricci's Local Rule 12(N) Statement. *See* Local Rule 12(M); *Schulz v. Serfilco*, 965 F.2d 516, 519 (7th Cir. 1992).

II. Standard of Review

Summary judgment disposes of a claim before trial in those cases where a trial is unnecessary and will only result in delay and expense. *Ford Motor Credit Co. v. Devalk Lincoln-Mercury, Inc.*, 600 F.Supp. 1547, 1549 (N.D. I11. 1985). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ. P. 56(c). A genuine issue of fact exists when a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

III. Count I: The Search

Mr. Ricci contends that Officer Whowell engaged in an unconstitutional search by reading his business documents on his premises without a warrant. The only evidence that Mr. Ricci points to in support of this claim is his statement that he saw Officer Whowell pick up and inspect a 3X5 index card off a desk. Mr. Ricci says the card contained information about a client. Mr. Ricci says he saw the officer pick up the card as they were walking toward him.

In reading his index card, the defendant officers may or may not have conducted a "search" within the meaning of the Fourth Amendment. To establish that a search occurred, Mr. Ricci bears the burden of proving that he had a legitimate expectation of privacy in the contents of the index card. *See, e.g., United States v. Myers*, 46 F.3d 668, 669 (7th Cir.) ("A search within the meaning of the Fourth Amendment occurs only when a reasonable expectation of privacy is infringed."), *cert. denied*, 116 S.Ct. 213 (1995); *United States v. Duprey*, 895 F.2d 303, 309 (7th Cir. 1989) ("A defendant objecting to the search of a particular area bears the burden of proving a legitimate expectation of privacy in the area searched."), *cert. denied*, 495 U.S. 906 (1990). "A reasonable expectation of privacy exists when '(1) the complainant exhibits an actual

(subjective) expectation of privacy and, (2) the expectation is one that society is prepared to recognize as "reasonable." " *United States v. Ruth*, 65 F.3d 599, 604 (7th Cir. 1995) (quoting, *Myers, supra*, 46 F.3d at 669).

Even if Mr. Ricci establishes that a search occurred, in order to get more than nominal damages he must establish an actual injury. *See Memphis Community School District v. Stachura*, 477 U.S. 299, 308 n.12 (1986) ("[N]ominal damages . . . are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury."); *Carey v. Piphus*, 435 U.S. 247 (1978) (damages may not be presumed for violations of due process clause). Although Mr. Ricci has alleged injury resulting from his arrest, he has not alleged any injury resulting from defendants reading his index card. Therefore, because I rule for the defendants on his other claims, Mr. Ricci will likely only receive nominal damages at trial. *Cartwright v. Stamper*, 7 F.3d 106 (7th Cir. 1993)[3] (plaintiff alleging emotional distress from search in violation of the Fourth Amendment received only $1 from jury) Despite the absence of a compensable injury, however,

3. In Cartwright, the plaintiffs did not contest the jury verdict. They did, however, contest the fact that the court had, due to the minimal damage award, reduced the lodestar amount of their attorney's fees by one-third. On appeal, the Seventh Circuit held that if a nominal damage award is de minimis, the court may deny all attorney's fees to the plaintiff. 7 F.3d at 109. The court adopted a three-factor test for courts to apply in determining when a nominal damage award is de minimis. Id. Thus, even though Mr. Ricci would be a "prevailing party" if the jury awards him nominal damages, he would not necessarily be entitled to his full attorney's fees. *See Farrar v. Hobby*, 113 S.Ct. 566 (1992) (denying attorney's fees where plaintiff recovered only $1).

Mr. Ricci's claim may go forward; whether, by reading an index card, the defendants executed an "unreasonable search" within the meaning of the Fourth Amendment is a question of fact precluding summary judgment.

IV. Count II: Unlawful Arrest

Mr. Ricci claims that he was arrested without probable cause, in violation of the Fourth and Fourteenth Amendments. "Police officers have probable cause to make an arrest where 'the facts and circumstances within their knowledge and of which they have reasonably trustworthy information are sufficient to warrant a prudent man in believing that the suspect has committed or was committing an offense."' *United States v. Levy*, 990 F.2d 971, 973 (7th Cir. 1993) quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

Plaintiff admits that the officers had a reasonable basis to believe that Rudeway Enterprises did not have a Village business license. He contends, however, that no ordinance required him to have such a license, and he therefore committed no offense for which he could be arrested. I disagree.

Section 14-3001 of the Village Code provides that "businesses hereinafter enumerated in Section 14-3002 shall be licensed in accordance with the provisions of this Code." Section 14-3002 contains an extensive list of businesses and includes a catch-all provision covering "[a]ny and all business enterprises not named elsewhere in this Code." Telemarketing is not named explicitly in the list, but does fall within the catch- all provision. Rudeway Enterprises was required to have a Village business license.

Mr. Ricci further contends that there is no ordinance authorizing his arrest as a corporate officer of a business operating without a license. Again, I disagree. Section 9-201 of the Village Code renders "it . . . unlawful for any person to conduct, engage in, maintain, operate, carry on or manage a business . . . for which a license is required by an provision

of this Code without first having obtained a license for such business." On the day of his arrest, Mr. Ricci was operating Rudeway Enterprises without a business license. The officers observed Mr. Ricci committing this unlawful act and consequently arrested him. The officers had probable cause to do so.

V. Count III: Municipal Liability

Mr. Ricci argues that the Village policy requiring full custodial arrests for violations of the business-license ordinance is unconstitutional. Although the Seventh Circuit has never addressed the question, the Fourth and Ninth Circuits have both found custodial arrests for local ordinance violations to be constitutionally acceptable. Additionally, the Supreme Court has questioned whether custodial arrests are appropriate for misdemeanor offenses, but has never explicitly addressed the question. *See Robbins v. California,* 453 U.S. 420, 450 n.11 (1981) (Stevens, J., dissenting) (acknowledging Justice Stewart's position in Gustafson and noting that the Court had not yet addressed any limitations on custodial arrests for minor offenses); *Gustafson v. Florida* 414 U.S. 260, 266 (1973) (Stewart, J., concurring) (declaring that "a persuasive claim might have been made . . . that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments").

The Fourth and Ninth Circuits have not followed Justice Stewart's intimations. In *Fisher v. Washington Metropolitan Area Transit Authority,* 690 F.2d 1133 (4th Cir. 1982), the plaintiff had been arrested for violating a county ordinance prohibiting eating on transit authority trains. She sued under §1983, claiming, *inter alia,* that her arrest was per se unconstitutional because the offense of eating on a train was punishable only by a fine and not by imprisonment. Id. at 1139 n.6. Without a more direct sign from the Court than an

acknowledgment of the issue, however, the Fourth Circuit refused to find custodial arrests for ordinance violations to be unconstitutional. Id.

More recently, in *Higbee v. City of San Diego,* 911 F.2d 377 (9th Cir. 1990), the court addressed the constitutionality of the plaintiffs' arrest for violating a municipal ordinance regulating "peep show establishments." The plaintiffs were sales clerks operating a peep show that did not conform to the city's municipal code requirements. Id. at 378. The clerks argued that they could have been issued a field release citation rather than being taken to jail for administrative processing of their arrest. Id . at 379. They sought damages under §1983, claiming that their treatment by the police was unreasonable within the meaning of the Fourth Amendment.

The court affirmed the district court's grant of summary judgment for the defendants. While recognizing that the police could have used the lesser field release citation, the court held that the Fourth Amendment did not require it. "[P]laintiffs did not have a constitutional right to immediate liberty once they were subjected to a lawful arrest." Id. at 379. The court found it constitutionally permissible to detain an arrestee for post- arrest administration, even for the misdemeanor offense of violating a municipal ordinance. Id.

In sum, the two federal courts to have addressed whether full custodial arrest for a minor violation is unreasonable under the Fourth Amendment have both held that it is not.

In opposition, Mr. Ricci points to dicta in *Gramenos v. Jewel Companies,* 797 F.2d 432 (7th Cir. 1986). In *Gramenos,* the Seventh Circuit admitted that "probable cause" alone may not render an arrest "reasonable" within the meaning of the Fourth Amendment. *Id.* at 441. Because the plaintiff in *Gramenos* did not promote this argument, however, the court simply found probable cause and did not address a separate reasonableness question. *Id.*

In discussing the issue, the court noted the common law rule allowing "an officer [to] make a custodial arrest for a misdemeanor only if the crime was committed in his presence." 797 F.2d at 441. In *Gramenos*, the arrest was based solely on the statement of a third-party; the crime was not committed in the officer's presence. Id. at 433-34. *Gramenos* shows, therefore, only that the Seventh Circuit appeared willing to incorporate into the Fourth Amendment reasonableness requirement the common law rule requiring an officer to witness a misdemeanor before arresting someone for it.

Even if I apply this common law rule, Mr. Ricci's arrest would still be reasonable. He committed his offense of operating a business without a license in the presence of Officers Whowell and Lehnert.[4] His arrest by them was therefore reasonable.

Mr. Ricci also points to a recent Supreme Court case, *Wilson v. Arkansas*, 115 S.Ct. 1914 (1995), to show that the Court sanctions an original intent in Fourth Amendment inquiries. The focus on original intent in constitutional questions it not a new phenomenon. *See id.* at 1916 (citing Supreme Court cases looking at original intent of Fourth Amendment as early as 1925). Thus the Supreme Court's silence regarding custodial arrests for minor offenses is no less valuable after *Wilson*. I agree with the Fourth Circuit that

> [u]ntil such an interpretation of the reasonableness requirement of the fourth amendment is adopted by the Court, we must assume that it applies alike to all criminal offenses — without regard to severity of permitted punishment — to allow reasonable custodial arrests as the traditional means for invoking the criminal process.

4. Defendants admit they knew Mr. Ricci was operating a business without a license before their arrival at his business. He ahs not argued that this knowledge required the police to obtain a warrant rather than rely on his admission of the fact in their presence.

I find that the Village policy requiring custodial arrests for violations of its business-license ordinance does not offend the Fourth Amendment.

VI. Conclusion

For the reasons set forth above, summary judgment is denied with respect to Count I. Summary judgment is granted on Counts II and III.

Dated: November 7, 1995

ENTER ORDER:

Elaine E. Bucklo
United States District Judge

LIST OF PARTIES

The Petitioner, Randall Ricci, is a citizen of the United States with a permanent residence in the State of Illinois.

The Respondent, the Village of Arlington Heights, is a Municipal Corporation organized under the laws of the State of Illinois. The Respondent has no parent corporation, subsidiaries, or affiliates and no stock in the Respondent is publicly traded.

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TABLE OF AUTHORITIES

BRIEF IN OPPOSITION

The Respondent, the Village of Arlington Heights, Illinois, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Seventh Circuit's opinion in this case.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 116 F.3d 288 (7th Cir. 1997) and is reprinted in the Petitioner's Appendix at A1-A10. The opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 904 F.Supp. 828 (N.D.Ill. 1995) and is reprinted in the Petitioner's Appendix at A11-A19.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 20, 1997, not June 20, 1995 as stated by the Petitioner.

STATEMENT OF THE CASE

On April 19, 1994, two Village of Arlington Heights police officers arrested the Petitioner at his place of business for operating a business without a license in violation of § 9-201 of the Arlington Heights Village Code. (Petitioner's Appendix, A2, A7, A12). The officers knew the Petitioner was operating his business in violation of the Code prior to entering the business premises, and the

violation was confirmed when the officers observed business being conducted in the presence and the Petitioner conceded to them that he did not have the required license. (Petitioner's Appendix, A2, A6). The Petitioner had been operating his business without a license for quite some time. (Petitioner's Appendix, A7).

Pursuant to the policy of the Village of Arlington Heights Police Department, the Petitioner was taken to the police station so that the charge against him could be processed. (Petitioner's Appendix, A2-3). As the Petitioner sat in an interview room at the police station, the officers prepared an arrest sheet and Local Ordinance Complaint, and bond was sought and approved. (Petitioner's Appendix, A3). The entire process took approximately one hour and the Petitioner was released upon the paperwork's completion and the issuance of a bond receipt. (Petitioner's Appendix, A3). In the interim, the Petitioner's wife obtained the required business license. (Petitioner's Appendix, A3).

The Petitioner brought an action in the United States District Court for the Northern District of Illinois under 42 U.S.C. § 1983 in which he claimed that the Village of Arlington Heights policy allowing a custodial arrest for violation of the Village business license ordinance is violative of the Fourth Amendment to the Constitution.[1] The

[1] Before the district court, the Petitioner also claimed that his arrest was without probable cause and therefore in violation of the Fourth Amendment. The district court rejected this claim on the basis that the officers observed the Petitioner violating the Code provision. (Petitioner's Appendix, A15-16). This claim was not raised on appeal and the Seventh Circuit rebuked the Petitioner's efforts to resurrect the claim at oral argument, noting that "a neutral magistrate following Illinois law would surely have issued a warrant in this case." (Petitioner's Appendix, A8, n.1).

district court entered summary judgment in favor of the Respondent and the Court of Appeals for the Seventh Circuit affirmed on the basis that the custodial arrest of the Petitioner was constitutionally permissible because the officers had probable cause to make the arrest and Illinois law permitted the utilization of a custodial arrest for fine-only ordinance violations. (Petitioner's Appendix, A5). According to the Seventh Circuit, the custodial arrest served the purpose of "prevent[ing] Ricci from continuing to violate a law he had been admittedly violating for some time," a purpose similar to suppressing breaches of the peace. (Petitioner's Appendix, A6-7). The length of time in which the Petitioner was held in custody, while not challenged by the Petitioner below, was determined by the Seventh Circuit to be required to "complete the necessary paperwork." (Petitioner's Appendix, A7).

REASONS WHY THE PETITION SHOULD BE DENIED

I. This Case Does Not Present An Important Constitutional Issue Which Warrants Review By This Court.

The Petitioner seeks review for the purpose of having this Court determine that the reasonable clause of the Fourth Amendment incorporates the common law rule prohibiting warrantless arrests in misdemeanor cases that

do not involve a breach of the peace and therefore the Petitioner's arrest was unconstitutional. The Respondent submits that for the reasons set forth below, this case simply does not raise an important constitutional issue which warrants review by this Court.

A. Absent a seizure conducted in an extraordinary manner, "reasonableness" under the Fourth Amendment is determined by the existence of probable cause.

In *Wilson v. Arkansas*, 514 U.S. 927, 115 S.Ct. 1914 (1995), this Court held that the common law principle that required law enforcement officers to knock and announce their presence before entering a dwelling is an element of the Fourth Amendment's "reasonableness" requirement and that lower courts should balance the common law principle against countervailing law enforcement objectives. 514 U.S. at 936, 115 S.Ct. at 1919.

The Petitioner here would suggest that *Wilson* stands for the proposition that common law principles existing at the time of the framing of the Constitution are the single most important factors to be considered by federal courts in determining whether a seizure is "reasonable" under the Fourth Amendment. (Petition at p. 7). Wilson, however, made it clear that common law principles are only sometimes part of the "reasonableness" inquiry:

> The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests. As even petitioner concedes, the common-law principle of announcement was never stated as an inflexible rule requiring announcement under all circumstances.

514 U.S. at 934, 115 S.Ct. at 1918.

Not all Fourth Amendment cases require courts to balance common law principles against countervailing law enforcement interests as a matter of course. In *Whren v. United States*, ___ U.S. ___, 116 S.Ct. 1769 (1996), for example, this Court observed:

> It is of course true that in principle every Fourth Amendment case, since it turns upon a "reasonableness" determination, involves a balancing of all relevant factors. With rare exceptions not applicable here, however, the result of that balancing is not in doubt where the search or seizure is based upon probable cause.
>
> • • •
>
> Where probable cause has existed, the only cases in which we have found it necessary actually to perform the "balancing" analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interest –.

116 S.Ct. at 1776.

Thus, under *Whren*, unless an arrest is conducted in an extraordinary manner, "reasonableness" under the Fourth Amendment is guided almost entirely by the existence of probable cause. *Id.* As discussed next, the Petitioner's arrest was based on probable cause and does not involve anything unusually harmful to Petitioner's privacy or his physical interests. Accordingly, this case does not fairly present the question of whether the common

law principle that permits custodial arrests for misdemeanors that involve breaches of the peace would render the Petitioner's arrest, which arguably did not involve a breach of the peace, unreasonable under the Fourth Amendment.

1. Probable cause for the Petitioner's arrest is undisputed.

Here, it is not disputed that the officers had probable cause to arrest the Petitioner for violating the Village's business license ordinance. Under this Court's decision in *Whren*, absent extraordinary intrusions to the Petitioner's privacy or physical interests, there would be no need to consider common law principles that might adversely affect the propriety of the arrest. While the Petitioner complains that vesting a police officer with the power to make a warrantless arrest is a "step toward a police state", (Petitioner's Appendix, A5), that step is always held in check by the Fourth Amendment's requirement that probable cause must exist.

2. Petitioner's arrest was not conducted in an extraordinary manner.

This Court has previously decided the issue of "reasonableness" in cases involving searches or seizures conducted in an "extraordinary manner." *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985) (seizure through use of deadly force); *Winston v. Lee*, 470 U.S. 753, 105 S.Ct. 1611 (1985) (search through physical penetration). Here, the Petitioner would have this court address this case as if

the Petitioner had been arrested in an "extraordinary manner."

Indeed, the Petitioner draws the Court's attention to *United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 463 (1971), wherein the Court stated that an "[a]rrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends."

"Reasonableness" under the Fourth Amendment is not, however, dictated by the expected or normal inconvenience and other personal aspects that may be encountered during a routine arrest. Even ordinary traffic stops entail "a possibly unsettling show of authority" and "interfere with freedom of movement, are inconvenient, and consume time" and "may create substantial anxiety." *Delaware v. Prouse*, 440 U.S. 648, 657, 99 S.Ct. 1391, 1398 (1979). The fact that the Petitioner here may have felt inconvenienced, embarrassed, or oppressed does elevate his case to one in which a balancing test must be employed under which the common law principle is weighed against the interest of the Village in processing the Petitioner and preventing his continued violation of the ordinance. To be sure, the Seventh Circuit expressed no measure of concern with the procedure through which the Petitioner was put through in the course of his arrest.

In the end, this Court is presented with a case in which the custodial arrest of the Petitioner was based upon probable cause and which was not conducted in an

extraordinary manner. There is no reason to balance the common law principle of permitting arrests only for misdemeanors that involve breaches of the peace against the interest of the Village in processing the Petitioner and preventing his continued violation of the business license ordinance. Certainly there is no reason for this Court to review this case when *Whren* and *Wilson* adequately address the constitutional issue proffered by the Petitioner.

B. Even if the common law was to be considered in determining whether the arrest of the Petitioner was reasonable, the Seventh Circuit's opinion contains a proper constitutional analysis that does not warrant review.

The Petitioner has raised two questions upon which review is sought. First, the Petitioner asks the Court to consider whether the common law principle of only allowing arrests for misdemeanors that involve breach of the peace should be considered in determining whether an arrest is reasonable under the Fourth Amendment. Second, the Petitioner asks this Court to determine whether one of the Seventh Circuit's bases for determining the Petitioner's arrest to be reasonable was proper. For the following reasons, the Respondent submits that neither issue warrants review in this case.

With regard to the consideration of the common law principle regarding arrests for misdemeanors when there is no breach of the peace, it is submitted that the Seventh Circuit did in fact do as directed by the Supreme Court.

In *Wilson v. Arkansas*, 514 U.S. 927, 936, 115 S.Ct. 1914, 1919 (1995), this Court correctly refused to set forth every possible law enforcement objective that could be considered by lower courts in determining whether a particular search or seizure is reasonable under the Fourth Amendment. There exists no reason for this Court to withdraw from this position. *Whren* dictates that flexibility premised upon the individual circumstances must be the order of the day. 116 S.Ct. at 1776-77.

Here, the Seventh Circuit acknowledge that under the common law, police could effect an arrest for a misdemeanor committed in their presence. The court further acknowledged that the strict common law rule had been relaxed in Illinois and other states to extend the authority to arrest to misdemeanors and ordinance violations that did not involve breaches of the peace. (Petitioner's Appendix, A6-7). According to the court:

> The rationale for allowing warrantless arrests for breaches of the peace was to promptly suppress breaches of the peace. Here the arrest served a similar purpose. The arrest prevented Ricci from continuing to violate a law he had been admittedly violating for some time.

Petitioner's Appendix, A7.

From the foregoing analysis of the common law and the necessity of permitting the Petitioner's arrest, the Seventh Circuit has done exactly what the Petitioner has requested: The court incorporated the common law principle into its analysis of the reasonableness requirement of the Fourth Amendment. In light of this Court's pronouncement in *Wilson*, review by this Court would not accomplish anything more.

The Petitioner also draws on the rhetoric of the Seventh Circuit to the effect that the Petitioner's arrest was only to "ensure compliance." (Petition, at p. 5). In light of the court's analysis of the arrest as a means which "prevented Ricci from continuing to violate the law which he had been admittedly violating for some time," (Petitioner's Appendix, A7), it is submitted that the phrase "ensure compliance" has been taken out of context by the Petitioner.

In any event, the vitriolic argument that "vesting a police officer with the power to make a warrantless arrest to 'ensure compliance' is a step to a police state," (Petition, at p. 5), fails to take into account that a court's consideration of the common law, if required, is not the only level of protection to the citizenry. As noted before, the Fourth Amendment's requirement of probable cause is the most significant roadblock to "broad and unregulated power." (Petition, at p. 5).

II. There Is No Conflict Among The Federal Courts Which Requires Resolution By This Court.

The Petitioner claims that "the federal courts of appeals which have considered this issue have reached conflicting results." (Petition, at p. 6). This is simply not true. In fact, courts have consistently held that where probable cause to make an arrest exists and state law permits such an arrest, the Fourth Amendment is not violated by a custodial arrest for a fine-only ordinance violation that does not involve a breach of the peace.

Such is the view of the Seventh Circuit in this case and in *United States v. Trigg*, 878 F.2d 1037 (7th Cir. 1989),

the Fourth Circuit in *Fisher v. Washington Metropolitan Area Transit Authority*, 690 F.2d 1133 (4th Cir. 1982), the Ninth Circuit in *Higbee v. City of San Diego*, 911 F.2d 377 (9th Cir. 1990) and *Pierce v. Multnomah County*, 76 F.3d 1032 (9th Cir. 1994), and the Fifth Circuit in *United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987).

With no conflict among the circuits that have decided the issue, review is not necessary and should not be granted here.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Dated: November 26, 1997

Respectfully submitted,

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Counsel of Record
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Counsel for the Respondent

(4)

No. 97-501

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

RANDALL RICCI,

Petitioner,

v.

VILLAGE OF ARLINGTON, HEIGHTS
A MUNICIPAL CORPORATION,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 17, 1997
CERTIORARI GRANTED JANUARY 9, 1998

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RELEVANT DOCKET ENTRIES

12/29/94	Complaint filed
2/24/95	Answer by defendants Arlington Hts IL, Andrew Whowell, Jerome Leonard to complaint
7/21/95	Motion by defendants Arlington Hts IL, Andrew Whowell, Jerome Leonard for summary judgment
8/17/95	Memorandum by plaintiff in opposition to motion for summary judgment; plaintiff's Local Rule 12(n) Statement
11/7/95	Memorandum, Opinion, and Order
11/7/95	Minute Order of 11/7/95 by Hon. Elaine E. Bucklo: Defendants' motion for summary judgment is denied in part and granted in part. The motion is denied with respect to count I and granted on counts II and III. Enter memorandum opinion and order.
12/8/95	Minute Order of 12/8/95 by Hon. Elaine E. Bucklo: Status hearing held. Defendant has until 01/31/96 to take the depositions of the three individuals referred to in court. Final pretrial order is due by 3/13/96. Response to any motions in limine will be due within 14 days after the filing of the pretrial order. Parties to submit one set of jury instructions with objections, if any. Objections to any exhibits must be documented with detailed reasons. Pretrial conference is set for 06/11/96 at 4:00p.m. This order is entered nunc pro tunc

	12/07/95.
4/12/96	Stipulation of dismissal.
4/16/96	Minute Order of 4/16/96 by Hon. Elaine E. Bucklo: Pursuant to stipulation of dismissal, count I of the complaint is hereby dismissed with prejudice.
4/17/96	Minute Order of 4/17/96 by Hon. Elaine E. Bucklo: Count one of the complaint having been dismissed pursuant to stipulation, pretrial conference set for 6/11/96 is vacated. Enter judgment pursuant to the memorandum opinion and order dated 11/7/95 in favor of the defendants and against the plaintiff. Any pending motion in this case is terminated as moot.
4/17/96	ENTERED JUDGMENT [Entry date 04/18/96]
5/15/96	NOTICE OF APPEAL by plaintiff from orders entered 11/07/95 and 04/17/96

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RANDALL RICCI,

Plaintiff,

No. 94 C 7732 *v.*

VILLAGE OF ARLINGTON HEIGHTS
A MUNICIPAL CORPORATION,
ANDREW WHOWELL and JEROME LEONARD

Defendants.

COMPLAINT

Plaintiff, by counsel, alleges as follows:

1. This is a civil action arising under 42 U.S.C. §1983. The jurisdiction of this Court is conferred by 28 U.S.C. §1343 and 28 U.S.C. §1367.

2. Plaintiff Randall Ricci is a resident of the Northern District of Illinois.

3. Defendant Arlington Heights, Illinois is an Illinois municipal corporation.

4. Defendants Andrew Whowell and Jerome Leonard were at all times relevant acting under color of their authority as police officers of Arlington Heights, Illinois.

FACTS

5. In 1994, plaintiff was the principal of Rudeway Enterprises, an Illinois corporation involved in the telemarketing industry and professional events in the premises located at 8½ Dunton in Arlington Heights, Illinois.

6. At about 3:00 p.m. on April 19, 1994, defendants Whowell and Leonard, acting under color of their authority of Arlington Heights police officers, entered

the above described business premises.

7. Defendants Whowell and Leonard did not have a warrant to search the above referred premises.

8. After entering the above referred premises, and without lawful consent, defendants Whowell and Leonard rummaged through plaintiff's confidential papers and entered non-public areas of the workplace.

9. After rummaging through plaintiff's papers and effects, defendants Whowell and Leonard spoke with plaintiff and asked him if he had a Arlington Heights business license. When plaintiff responded that he was not sure if he had a license, defendants placed plaintiff Ricci under arrest and transported him to a police station.

10. At all times relevant, there has not been any ordinance, rule, or regulation or of the Village of Arlington Heights of the State of Illinois requiring plaintiff or Rudeway Enterprises to possess a Village of Arlington Heights business license.

11. At all times relevant, neither defendant Whowell nor defendant Leonard had any lawful basis to arrest plaintiff Ricci.

12. Following his arrival at the police station, plaintiff Ricci was detained for several hours before being released on his own recognizance and being charged with a violation of Section 9-201 of the Arlington Heights Village Code. This charge was dismissed at plaintiff's initial court appearance on May 17, 1994.

13. **CLAIM I: FOURTH AMENDMENT UNLAWFUL SEARCH** In searching through plaintiff's papers without a warrant, defendants defendants Whowell and Leonard caused plaintiff to be deprived of rights secured by the Fourth and Fourteenth Amendments to the Constitution of the United States.

14. **CLAIM II: FOURTH AMENDMENT UNLAWFUL ARREST** In arresting plaintiff without probable cause, defendants Whowell and Leonard caused plaintiff to be deprived of rights secured by the Fourth and Fourteenth Amendments to the Constitution of the United States.

15. **CLAIM III: MUNICIPAL LIABILITY** The actions of defendants Whowell and Leonard in placing plaintiff under arrest for violation of a municipal ordinance that did not involve a breach of the public peace were undertaken in accordance with a policy of the Village of Arlington Heights authorizing its police officers to make a full custodial arrest for violations of any ordinance. This policy is contrary to the Fourth Amendment to the Constitution of the United States.

16. As the direct and proximate result of defendants' wrongful actions, and of defendant Arlington Heights' unconstitutional policy, plaintiff was deprived of his privacy, deprived of his liberty, required to appear in court to answer groundless charges, and subjected to emotional distress

17. Plaintiff hereby demands trial by jury.

WHEREFORE plaintiff prays that judgment be entered in his favor and against defendants in an amount in excess of fifty thousand dollars.

/s/ Kenneth N. Flaxman

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

ANSWER TO COMPLAINT AT LAW

NOW COME the Defendants, the VILLAGE OF ARLINGTON HEIGHTS, a Municipal Corporation (incorrectly named herein as Arlington Heights, Illinois), ANDREW WHOWELL and JEROME LEHNERT (incorrectly named herein as Jerome Leonard) , by their attorneys, DOWD & DOWD, LTD. , and for their Answer to the Plaintiff's Complaint state as follows, to-wit:

1. This is a civil action arising under 42 U.S.C. §1983. The jurisdiction of this Court is conferred by 28 U.S.C. §1343 and 28 U.S.C. §1367.

   ANSWER: The Plaintiff seeks to assert a cause of action under 42 U.S.C. 1983. The jurisdiction of this court for actions brought under §1983 is conferred by 28 U.S.C. §1343. To the extent that there are any viable and legitimate state law causes of action, 28 U.S.C. §1367 provides for this court's jurisdiction over the same. However, in the event that all federal claims shall be disposed of, it is inappropriate for this court to maintain jurisdiction over any state law claims under 28 U.S.C. §1367.

2. Plaintiff Randall Ricci is a resident of the Northern District of Illinois

   ANSWER: Admitted.

3. Defendant Arlington Heights, Illinois is an Illinois municipal corporation.

ANSWER: The Village of Arlington Heights is a Municipal corporation incorporated under the laws of the State of Illinois. The Defendant Village, however, denies that "Arlington Heights, Illinois" is an Illinois Municipal Corporation.

4. Defendants Andrew Whowell and Jerome Lehnert were at all times relevant acting under color of their authority as police officers of Arlington Heights, Illinois.

   ANSWER: The Defendants Andrew Whowell and Jerome Lehnert were acting within the scope of their authority as police officers of the Village of Arlington Heights, a Municipal Corporation. The remaining allegations contained in rhetorical paragraph 4 of the Plaintiff's Complaint are denied.

5. In 1994, plaintiff was the principal of Rudeway Enterprises, an Illinois corporation involved in the telemarketing industry and professional events in the premises located at Sk Dunton in Arlington Heights, Illinois.

   ANSWER: The Defendants are without sufficient information to admit or deny the allegations contained in rhetorical paragraph 5 of the Plaintiff's Complaint. As such, those allegations are deemed denied. The Defendants do, however, admit that the Plaintiff was operating a business in the premises located at 8½ Dunton in Arlington Heights, Illinois.

6. At about 3:00 p.m. on April 19, 1994, defendants Whowell and Lehnert, acting under color of their authority of Arlington Heights police officers, entered the above described business premises.

   ANSWER: The Defendants admit that at or about 3:00 p.m. on April 19, 1994, the Defendants, Whowell and

Lehnert, acting within the scope of their authority as police officers for the Village of Arlington Heights, a Municipal Corporation, entered the premises located at 8½ Dunton in Arlington Heights, Illinois. The Defendants deny the remaining allegations contained in rhetorical paragraph 6 of the Plaintiff's Complaint.

7. Defendant Whowell and Lehnert did not have a warrant to search the above referred premises.

ANSWER: The Defendants admit that the Defendants Whowell and Lehnert did not have a warrant to search the premises located at 8½ Dunton in Arlington Heights, Illinois. The Defendants submit that they did not need a search warrant to enter the premises.

8. After entering the above referred premises, and without lawful consent, defendants Whowell and Lehnert rummaged through plaintiff's confidential papers and enter non-public areas of the workplace.

ANSWER: Denied.

9. After rummaging through plaintiff's papers and effects, defendants Whowell and Lehnert spoke with plaintiff and asked him if he had an Arlington Heights business license. When plaintiff responded that he was not sure if he had a license, defendants placed plaintiff Ricci under arrest and transported him to a police station.

ANSWER: The Defendants deny rummaging through the plaintiff's papers and effects. The Defendants admit that the Defendants Whowell and Lehnert spoke with the Plaintiff and asked if he had an Arlington Heights business license. The Defendants deny that the Plaintiff responded that he was not sure if he had a license. The Defendants admit that the Defendants Whowell and

Lehnert placed the Plaintiff under arrest and transported him to the Village of Arlington Heights police station.

10. At all times relevant, there has not been any ordinance, rule, or regulation or of the Village of Arlington Heights of the State of Illinois requiring plaintiff or Rudeway Enterprises to possess a Village of Arlington Heights business license.

ANSWER: Denied. At the time of the offense, April 19, 1994, Ch. 9-201 of the Village of Arlington Heights Municipal Code made it unlawful for any person to conduct, engage in, maintain, operate, carry on or manage a business, occupation or activity, without first having obtain a license to do so.

11. At all times relevant, neither defendant Whowell nor defendant Lehnert had any lawful basis to arrest plaintiff Ricci.

ANSWER: Denied.

12. Following his arrival at the police station, plaintiff Ricci was detained for several hours before being released on his own recognizance and being charged with a violation of Section 9-201 of the Arlington Heights Village Code. This charge was dismissed at plaintiff's initial court appearance on May 17, 1994.

ANSWER: The Defendants deny that the Plaintiff was detained for several hours before being released on his own recognizance. The Defendants admit that the Plaintiff was charged with a violation of §9-201 of the Village of Arlington Heights Municipal Code. The Defendants further admit that this charge was dismissed at the Plaintiff's initial court appearance on

May 17, 1994 after it was established that the Plaintiff's wife had, subsequent to the Plaintiff's arrest, procured the license required under the Village of Arlington Heights Municipal Code.

13. CLAIM I: FOURTH AMENDMENT UNLAWFUL SEARCH In searching through plaintiff's papers without a warrant, defendants Whowell and Lehnert caused plaintiff to be deprived of rights secured by the Fourth and Fourteenth Amendments to the Constitution of the United States.

ANSWER: Denied.

14. CLAIM II: FOURTH AMENDMENT UNLAWFUL ARREST In arresting plaintiff without probable cause, defendants Whowell and Lehnert caused plaintiff to be deprived of rights secured by the Fourth and Fourteenth Amendments to the Constitution of the United States.

ANSWER: Denied.

15. CLAIM III: MUNICIPAL LIABILITY The actions of defendants Whowell and Lehnert in placing plaintiff under arrest for violation of a municipal ordinance that did not involve a breach of the public peace were undertaken in accordance with a policy of the village of Arlington Heights authorizing its police officers to make a full custodial arrest for violations of any ordinance. This policy is contrary to the Fourth Amendment to the Constitution of the United States.

ANSWER: Denied.

16. As the direct and proximate result of defendants' wrongful actions, and of defendant Arlington Heights' unconstitutional policy, plaintiff was deprived of his privacy, deprived of his liberty, required to appear in court to answer groundless charges, and subjected to emotional distress.

ANSWER: Denied.

17. Plaintiff hereby demands trial by jury.

ANSWER: The Plaintiff's request for trial by jury is not a proper factual allegation within the body of a Complaint. Accordingly, the Defendants recognize the right of the Plaintiff to seek trial by jury, but plead no response thereto.

WHEREFORE, the Defendants respectfully request this court to enter judgment against the Plaintiff and in favor of the Defendants and to further order the assessment of costs, and attorney's fees against the Plaintiff.

AFFIRMATIVE DEFENSES

NOW COME the Defendants, the VILLAGE OF ARLINGTON HEIGHTS, a Municipal Corporation (incorrectly sued as Arlington Heights Illinois), ANDREW WHOWELL and JEROME LEHNERT, and submit the following Affirmative Defenses in response to the Plaintiff's Complaint.

The Defendants submit that the Plaintiff's Complaint fails to state a cause of action under the Fourth Amendment as made applicable by virtue of the Fourteenth Amendment to the Constitution of the United States. In particular, the Defendants submit that the Defendants did not conduct a search of the plaintiff's papers in violation of the Fourth Amendment, did not arrest the Plaintiff without probable cause, and that the Village of Arlington Heights did not

enact, implement, or enforce any policy regarding the use of full custodial arrests that is contrary to the Fourth Amendment.

WHEREFORE, the Defendants, the VILLAGE OF ARLINGTON HEIGHTS, a Municipal Corporation, ANDREW WHOWELL and JEROME LEHNERT, respectfully request this court to enter judgment against the Plaintiff and in favor of the Defendants and to further order the assessment of costs, and attorney's fees against the Plaintiff.

/s/ Jeffrey E. Kehl
Attorney for Defendant

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(312) 704-4400

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

MOTION FOR SUMMARY JUDGMENT

NOW COME the Defendants, VILLAGE OF ARLINGTON HEIGHTS, a Municipal Corporation, ANDREW WHOWELL and JEROME LEHNERT, by their attorneys, DOWD & DOWD, LTD., and, pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves this court to enter summary judgment on claims 1, 2, and 3 of the Plaintiff's Complaint on the basis that there is no genuine issue of material fact and the Defendants are entitled to judgment as a matter of law. In support of this Motion for Summary Judgment, the Defendants submit the following pleadings, papers, affidavits, and deposition transcripts for the court's consideration:

1. The Plaintiff's Complaint filed December 29, 1994.
2. The Defendants' Answer filed February 24, 1995.
3. Statement of Material Facts Not in Dispute.
4. Affidavit of Robin Ward, Assistant Village Attorney for the Village of Arlington Heights.
5. Transcript of the deposition of Randall Ricci taken April 28, 1995.
6. Transcript of deposition of Jerome Lehnert taken May 23, 1995.
7. Transcript of deposition of Andrew Whowell taken May 23, 1995.
8. Transcript of deposition of John Fellmann taken June 15, 1995.

9. Memorandum of Law in support of Motion for Summary Judgment filed contemporaneously herewith.

WHEREFORE, based upon the foregoing submissions, the Defendants respectfully request this court to enter summary judgment in their favor on Claims I, II, and III of the Plaintiff's Complaint, and to grant all other relief just and proper in the premises.

/s/ Jeffrey E. Kehl
an attorney for defendants

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

AFFIDAVIT OF ROBIN WARD

I, ROBIN WARD, having been duly deposed and upon my oath state as follows:

1. I am the Assistant Village Attorney for the Village of Arlington Heights, Illinois.

2. I am familiar with and have access to all valid and duly enacted ordinances of the Village of Arlington Heights. From my familiarity with the valid and properly enacted ordinances of the Village of Arlington Heights, I can state that the following ordinances were in full force and effect on April 19, 1994:

Section 14-3001 Licensing of Businesses The places of businesses hereinafter enumerated in Section 14-3002 shall be licensed in accordance with the provisions of this Code. The license fee for each business shall be that got forth in Section 14-3002. All businesses so licensed shall comply with the general licensing provisions of Chapter 9 of this Code, and shall comply with all ordinances of the Village of Arlington Heights relating to the use and occupancy of the premises in which such businesses are located. The Village Manager may direct appropriate Village officers to make such inspections of the places of business of said licensees as he may deem necessary from time to time for the purpose of enforcing all the applicable ordinances of the Village of Arlington Heights. Such inspections shall be in addition to those required under other provisions of the ordinances of the Village and other sections of this

Code.

Section 14-3002 Licenses Businesses and Fees (a) The license fees for the businesses listed below shall be determined based on the size of the business operation in accordance with the following standardized standardized calculation fee schedule:

$100.00	under 1,000 square feet*
$150.00	1,001-5,000 square feet*
$300.00	5,001-12,000 square feet*
$600.00	12,001 square feet* and over

(*square feet = tbe total building square footage including retail areas and indoor storage areas)

Any and all business enterprises not named elsewhere in this Code.

Section 9-201 License required. Except as otherwise provided in Section 9-202 of this Code [exemption for double licensing], it shall be unlawful for any person to conduct, engage in, maintain, operate, carry on or manage a business, occupation or activity, either by himself or through an agent, employee or partner, for which a license is required by any provision of this Code without first having obtained a license for such business, occupation or activity. Any person violating this section shall be fined not less than Five Dollars ($5.00) nor more than Five Hundred Dollars ($5OO.00) for each offense. A separate offense shall be deemed committed an each day during or on which a violation occurs or continues.

Further your affiant sayeth naught.

/s/ Robin Ward
Assistant Village Attornry

[jurat omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[title omitted in printing]

Deposition of John Fellmann

JOHN FELLMANN, called as a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY MR. FLAXMAN:

[3] Q. Could you state your name and spell your last name, please?

A. John Fellmann, F E L L M A N N.

Q. What's your business or occupation?

A. I'm a commander of police.

Q. And by whom are you employed?

A. The Arlington Heights Police Department.

Q. For how long have you been employed by the Arlington Heights Police Department?

A. 23 years.

Q. And how long have you been a police officer?

A. 23 years.

Q. How old are you?

A. 48.

* * * [9]

Q. Have you ever heard of someone named Randall Ricci?

A. Yes.

Q. When is the first time you heard of Mr. Ricci?

A. April of 1994.

Q. How did you have occasion to hear about Mr. Ricci?

A. One of the investigators in my command had arrested Mr. Ricci for operating a business without a license.

Q. Do you know the name of that investigator?

A. Andrew Whowell.

Q. Could you spell Whowell?

A. W H O W E L L.

Q. Was that the first time you had heard about Mr.Ricci?

A. Yes.

Q. Had you heard about [10] Mr. Ricci's business before the date that Mr. Whowell told you that Mr. Ricci had been arrested?

A. Yes.

Q. When had you first heard about Mr. Ricci's business?

A. Several weeks earlier.

Q. How had you heard about his business?

A. Several businessmen in the community had called the office of the chief or the deputy chief, those calls in turn transferred to me. These business people were asking questions and complaining about some telemarketing practices that they felt were representative of the Arlington Heights Police Department.

Q. Do you remember the names of anybody who called with these concerns?

A. No.

Q. Did you speak to any of these people?

A. Yes.

Q. How many of these people did you speak to?

A. Approximately a half a dozen.

Q. Did you make any notes as you were having any of these conversations?

A. No.

Q. Did you write any reports as the result — or make any — strike that. Did you write any reports which contain [11] information that you learned in any of these conversations?

A. No.

Q. What, if anything, did you do as a result of the concerns that these businessmen had shared with you?

A. I had had a conversation with Investigator Whowell in April indicating that we had a business, a telemarketing business in town here, and asked him to check and see if they were properly licensed.

Q. Now, let's go back to the questions about the telemarketing firm that these businessmen had shared with you. What — do you recall any of the questions that any of these businessmen had?

A. To the effect they wanted to know if the Arlington Heights Police was conducting any sort of a fund drive.

Q. And was the Arlington Heights Police conducting a fund drive?

A. No.

Q. Did they tell you why they wanted to know that?

[12] A. That they received phone calls or they were being asked to contribute money to an organization that was alluding to an affiliation with the Arlington Heights Police Department.

Q. Did you ever — well, strike that. Was there ever any investigation to find out if, in fact, there was an organization that was making phone calls conveying the impression that they were soliciting money for the Arlington Heights

Police Department?

A. Phone call, no.

Q. And what kind of complaints about the practices did you receive from any of those businesses?

A. They were complaining about high pressure to contribute. They were not accustomed to contributing money on behalf of the Arlington Heights Police because that is not our practice. This was something new that they weren't familiar with.

Q. Now, when you asked Mr. Whowell to check to see if this telemarketing firm was properly licensed, what kind of license were you referring to?

[13] A. Business license.

Q. Back in this time, April of 1994, was there any requirement of which you were aware in Arlington Heights that a telemarketing firm have a business license?

A. All businesses require a business license.

Q. Is there a — well, strike that. Does the village, to your knowledge — well, strike that. Is a business license something you get by filling out a form and paying a fee or does the village exercise discretion about who can get a business license and who can't get a business license?

A. You fill out a form, pay the fee, and upon approval license is issued.

Q. So there's no — am I correct that there's no investigation to see if the business is a moral business before a business license is issued in Arlington Heights?

A. Yes, there is.

Q. Yes there is what?

A. Yes, there is an investigation.

[14] Q. What kind of investigation is there?

A. For business licenses, usually it is just a computerized criminal history check of the principals of the

organization.

Q. Well, let's assume — if there was a telemarketing firm that was saying that it was soliciting funds for the Arlington Heights Police Department, would that have been against the law in Arlington Heights back in April of '94?

A. To operate without a license?

Q. Well, let's assume that you have a telemarketing firm that has an Arlington Heights business license that's making phone calls giving the impression that they're soliciting funds on behalf of the Arlington Heights Police Department. Would that have been illegal?

A. I'm not aware if that would be illegal.

Q. What about the same telemarketing firm that had a license, an Arlington Heights business license, that was using high pressured tactics in phone calls soliciting funds, would that have been illegal in Arlington Heights?

A. I'm sorry. Would you repeat the question?

[15] Q. If you have a telemarketing firm in Arlington Heights that has a business license whose telemarketers are using high pressure tactics over the phone, would that have been illegal?

MR. KEHL: Do you know what he means by high pressure tactics?

THE WITNESS: No, I don't.

BY MR. FLAXMAN:

Q. Of the type that had been complained to you by those business reps.

A. No, I don't know.

Q. Why was it that you asked Investigator Whowell if this telemarketing business about which you had the complaints was properly licensed?

A. Because we had received these reports about a telemarketing firm with whom we weren't familiar, and before we went out and talked to him, as a matter of course, we often check to see if they are licensed.

Q. Do you know what, if anything, Investigator Whowell did to see if the company, if the telemarketing firm was licensed?

A. He checked with our building department who issues the licenses to see if they had a record [16] on file of having issued one.

Q. Were you informed of the results of that inquiry?
A. Yes.

Q. Who informed you?
A. I believe Andy Whowell.

Q. When was that?
A. In April of '94.

Q. And did you have any further conversation about this telemarketing firm at that time with Mr. Whowell after he told you about the — about it did not appear to be licensed?

A. I instructed him to check with the principals of the organization should he ever have occasion to be over there.

Q. Did you know Mr. Whowell was going to be going over to that telemarketing firm?
A. Yes.

Q. When did you know that?
A. About the same time period.

Q. How did you learn that he was going over there?

A. He had advised me that he was going to be executing an arrest warrant for Mr. Dugo —

[17] Q. Is that D U G O?

A. Correct. (Continuing) — in regards to a theft complaint that he had worked on earlier.

Q. And did you tell him that while you're over there check to see if they have the license?
A. Yes.

Q. Did you tell him what to do if he discovered that the telemarketing firm did not have a business license?
A. Yes.

Q. What did you tell him to do?
A. Take the appropriate action.

Q. And did you tell him what the [18] appropriate action was?
A. No.

Q. Well, what did you understand the appropriate action — no. What did you mean when you said take the appropriate action?

A. To an experienced investigator, the appropriate action would be whatever he deems appropriate at the time.

Q. Well, what did you believe the appropriate action would be?

A. If we have a violation of ordinance, the suspect is arrested, brought to the station, charged, bonded, and given a court date.

Q. Now, if you — in Arlington Heights, if you park next to — in a handicapped parking space, is that a violation of a municipal ordinance?
A. It is.

Q. Are people who park in a handicapped parking space arrested, charged, and bonded?
A. No.

Q. Why is that?

A. The protocol is the issuance of a parking ticket.

Q. Are there some municipal ordinances for which the established protocol does not — does not involve full custodial arrest?

A. Parking violations.

Q. Any other ordinance violations of which you're aware?

A. Some liquor violations.

Q. Could you give me some examples?

A. Someone over the age of 21 who might possess alcohol in one of the parks could be issued [19] a citation.

Q. Are there any other ordinances other than parking violations and some liquor violations that are — that did not result in a full custodial arrest?

A. I can't think of any.

Q. This conversation with Mr. Whowell where he told you he was going out to the telemarketing firm, was that the same day that Mr. Ricci was arrested?

A. I don't recall.

Q. Did you speak with Mr. Whowell after he went out to — after he arrested Mr. Ricci?

A. Yes.

Q. Did you speak to Mr. Whowell while he was at the scene at the telemarketing firm?

A. No.

Q. When you spoke with — when you spoke with him after he arrested Mr. Ricci, was that the same date of the arrest?

A. Yes.

Q. Where did the conversation take place?

A. In the detective division office.

Q. Was anybody else present during the [20] conversation?

A. Probably.

Q. Well, who else was there?

A. I don't recall.

Q. Was anybody else taking part in the conversation?

A. I don't recall.

Q. What did Mr. Whowell say?

A. That he had brought in Mr. Ricci for the violation of the village ordinance.

Q. Where was Mr. Ricci at this time?

A. In the building.

Q. When you told Mr. Whowell to check to see if this telemarketing concern was properly licensed, were you trying to stop the telemarketing firm from causing the kind of complaints you had received about them?

A. Yes.

Q. Why was that?

A. Because it was negatively reflecting upon the image of the department.

* * *

[21] Q. He's very tall. After Mr. Ricci was arrested, did you have any conversations with anybody about the — about Mr. Ricci's telemarketing concern and their tactics?

[22] A. I apprised my superior officers.

Q. Who, who did you tell?

A. Captain Schenkel.

Q. What did you tell him?

A. That the parties involved in the telemarketing had been charged with a violation of the village ordinance.

Q. What did Captain Schenkel say?
A. "Fine."

Q. And when did you have that conversation?
A. I believe it was that day.

Q. Had Captain Schenkel told you about these complaints?
A. No.

Q. How did the complaints from the citizens get routed to you?
A. The switchboard operator to the secretary for either the chief or the deputy — would transfer these calls down.

Q. Had you had any conversations with your superiors?
A. I believe I told Captain Schenkel that I had received these complaints and we were looking into it.

[23] Q. What did he say?
A. "Fine."

Q. Is there — well, is there a particular ordinance in Arlington Heights that requires that all businesses be licensed?
A. Yes.

Q. Do you know what provision that is?
A. I recall it's in Chapter 9 of the Municipal Code, but which one I don't immediately recollect.

Q. Let me show you what's previously been marked as Plaintiff's Exhibit 2 for ID as of 5/23/95. Does that look —
A. Yes.

Q. Okay. Is that a copy of the ordinances of the Village of Arlington Heights?
A. It is.

Q. Is that Section 9-201 the section that you believe requires all businesses to have licenses?

A. Yes.

Q. And as far as you know, do all businesses in Arlington Heights have licenses?
[24] A. Do all?

Q. Right. Excuse me?
A. I don't believe they all do.

Q. Other than Mr. Ricci, do you know anyone else in Arlington Heights who has been arrested for not having a business license?
A. I know of other instances. The names don't come to me immediately.

Q. Have there been any arrests in 1955 for not having a business license?
A. Yes.

Q. How many?
A. I'm aware of one.

Q. What was that business doing?
A. He was soliciting for money on the street corner.

Q. Panhandling?
A. Yes.

Q. And is that — was he arrested for not having a license under 9-201?
A. I believe so.

Q. Can you think of — well, was anybody else, to your knowledge, arrested in 1995 for not having a business license?
[25] A. Not to my knowledge.

Q. How about 1994 other than Mr. Ricci?
A. I have a recollection that somebody was, but who it was, I can't —

Q. Do you recall what their business was?
A. No.

Q. 1993?
A. Yes.

Q. And —
A. But, again, no recollection.

Q. Is there any plan or practice that the police department follows to check on compliance with the business license requirement?
A. Plan to check on compliance?

Q. Correct.
A. No.

Q. Well, when there's a new business, does the police department visit it to check and see that they have a license?
A. No.

Q. When arrests are made, does the police department in Arlington Heights check to see that the business has a license?
A. Yes.

[26] Q. Is FOP Lodge 80 in Arlington Heights?
A. Yes.

Q. Have you ever been a member of FOP Lodge 80?
A. Yes.

Q. Are you still a member?
A. No.

Q. When did you stop being a member?
A. Approximately 1986.

Q. And why did you stop being a member?
A. I was promoted to the rank of sergeant, and at that time the lodge formed the new bargaining unit and all staff members were excluded from membership in the bargaining

unit.

Q. Has FOP Lodge 80 ever employed telephone solicitors to raise money?
A. Yes.

Q. When was that?
A. I don't know.

Q. Was that when you were a member?
A. I'm sorry?

Q. Was that when you were a member of Lodge 8 0 ?
A. It's possible. I can't recall.

[27] Q. Do you know anybody who would know about that?
A. Present and past officers.

Q. Do you remember any problems with the telephone solicitation?
A. There were some complaints, yes.

Q. What kind of complaints were there?
A. That they were representing that they were members of the Arlington Heights Police Department.

Q. We're talking about FOP Lodge 80?
A. Yes.

Q. What kind of complaints were they?
A. That the telemarketing would help themselves as members of the Arlington Heights Police Department.

Q. And were they, in fact, members of the Arlington Heights Police Department?
A. No.

Q. Were there any other problems with FOP Lodge 80 and solicitation?
A. Not that I'm aware of.

Q. Did FOP Lodge 80 come away with bad feelings about telephone solicitation?

[28] A. I can't speak for the lodge.

Q. Did you ever learn that Mr. Ricci's wife bought a business license?

A. Not —

Q. Excuse me?

A. I didn't.

Q. Did you ever learn that Mr. Ricci's company paid for a business license?

A. Yes.

Q. When did you learn that?

A. It was about the first court date, which date escapes me, but about that —

Q. Did you go to court?

A. No.

Q. Who went to court?

A. Andy Whowell.

Q. And how did you learn about what had happened at the first court date?

A. He informed me.

Q. What else did he tell you?

A. That the matter had been dismissed because of compliance.

Q. Were new police officers added to Arlington Heights Police Department in 1994?

[31] A. I don't recall.

Q. When did it become — do you recall when it became a smoke free environment?

A. No, I do not.

Q. For how long has it been the policy about ordinance violation arrests that you described, arresting, charging, has that been the policy of Arlington Heights since the time you

joined the police department?

A. Yes.

MR. FLAXMAN: I have nothing further. Do you have any questions?

MR. KEHL:Yes.

EXAMINATION BY MR. KEHL:

Q. With regard to the local ordinance violation policy of the Village of Arlington Heights with regard to a business that does not have a Village of Arlington Heights business license, can you state why those persons are arrested?

A. For violation of that village ordinance.

Q. Why aren't they just issued a ticket, do you know?

[32] A. We have no instrument designed for citing them in the field. I mean, the manner in which our department is structured is that the complaint is prepared on a document at our station and bond is required if this is a bondable offense.

Q. Is there a set policy or procedure for how an arrest is to be effected for a violation of the Village of Arlington Heights ordinance pertaining to business licenses?

A. No. All arrests are the same.

Q. Are they all effected the same?

A. No. Each circumstance is different.

Q. Okay. Can you explain the difference in how an arrest for violation of this particular village ordinance would be effected differently from, say, a violation of — take a violent felony statute.

A. Officer safety is utmost, so once the arrestee is secured, then we search, they're handcuffed, placed into our car, transported to the station.

Q. Okay. Let's go through that. Why do you perform a search on the arrestee?

[33]

A. For the officer's safety.

Q. Why is the arrestee handcuffed?

A. Both for the officer's safety and for the arrestee's safety so that he can't escape the vehicle while it is in motion.

Q. When the arrestee is transported to the police department, what happens then?

A. He's brought out of the car and into the building, either taken to a lockup or an interview room.

Q. What determines whether the arrestee goes to the lockup or the interview room?

A. Officer's convenience, unless lockup might have somebody in there already, the officer may want to fill out the — in Andy Whowell's case, he's assigned to the investigative unit so the interview rooms are convenient.

Q. How come for something as simple as this ordinance violation they aren't allowed to sit in the lobby of the police department?

A. Because we need to complete our process. That doesn't occur in the lobby. it occurs back in the operation area of the department.

[34] Q. Can't the arrestee sit in the lobby?

A. Not until bond arrives.

Q. This interview room, what are interview rooms for?

A. Interviewing victims, witnesses, suspects.

Q. It's not just solely for arrestees, you would also put victims in there, witnesses?

A. Yes.

Q. The access to the interview room, that's through a door?

A. Yes.

Q. Can you open that door from the outside?

A. No.

Q. Is there a switch on the outside of that door that allows you to be able to open from the inside?

A. No.

Q. Is there a reason for that?

A. For the safety of the individual so he doesn't wander around, for the safety of the officers so the people cannot exit unannounced.

Q. Are you aware of the purpose behind the Village of Arlington Heights' ordinance requiring [35] businesses to be licensed?

MR. FLAXMAN:Object to the form of the question. That assumes that there is such an ordinance.

BY MR. KEHL:

Q. You can go ahead and answer that.

BY THE WITNESS:

A. Okay. I understand it to be so that they can regulate the businesses for the safety and welfare of the community.

Q. Who is "they"?

A. Village administrator.

Q. Is there any particular department of the village administrator that would need this?

A. I would —

Q. Don't guess, if you know.

A. Fire department knows the number of employees; we, the police department, so we know what the parking mode might be in the downtown area, number of employees driving, we factor that in when we compute daily parking requirements in the Central Business District; building department to make sure that business isn't introducing

chemicals in the environment that isn't — a business is not [36] introducing chemicals into an environment that's not capable of handling them. Those are some of the reasons that I know of.

Q. Is it the policy and procedure of the Village of Arlington Heights Police Department to cause an arrest to be effected for violation of the ordinance requiring business licenses when an officer discovers the particular business does not have a license?

A. Yes.

Q. And are the officers of the Village of Arlington Heights Police Department told that all businesses within — or told by the staff, meaning the commanders and deputy chiefs and chiefs or chief, are they told by them that any business operating in the Village of Arlington Heights is required by village ordinance to have a business license issued by the Village of Arlington Heights?

A. Yes.

MR. KEHL: Nothing further.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

Deposition of Jerome Lehnert

JEROME LEHNERT, called as a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY MR. FLAXMAN:

Q. Could you state your name and spell your last name.

A. Jerome Lehnert, L-e-h-n-e-r-t.

Q. What's your business or occupation?

A. I'm a police officer for the Village of Arlington Heights.

Q. How long have you been a police officer with Arlington Heights?

A. I'm in my 19th year.

Q. How old are you?

A. 42.

Q. What's your present assignment?

A. The criminal investigation bureau.

Q. How long have you been in the criminal investigation bureau?

A. Two and a half years.

Q. What did you do before that?

[4] A. Patrol, traffic.

Q. Back on April 19, 1994, did you have occasion to go to 8½ Dunton or something like that?

MR. KEHL: Dunton.

MR. FLAXMAN: Dunton.

MR. KEHL: Dunton, D-u-n-t-o-n.

BY MR. FLAXMAN:

Q. Dunton?
A. Yes.

Q. Why did you go there?
A. To assist my partner to serve a warrant.

Q. Who had the primary responsibility for serving the warrant?

A. It was my partner's case.

Q. Who was your partner?
A. Investigator Whowell.

Q. When you went there, to 8½ Dunton, did you have § was there any other assignment that you had or that your partner had in addition or aside from serving the warrant?

A. We had been instructed by our lieutenant to check the business, make sure it was a legitimate operation.

[5] Q. When you say we had been instructed § we will take a step back. Your lieutenant, was that Lieutenant Fellman?

A. Correct.

Q. When you say we had been instructed, had Lieutenant Fellman instructed you personally?

A. No.

Q. He had instructed your partner, whose name I don't pronounce as well as you do?

A. Investigator Whowell.

Q. Whowell. Investigator Whowell had shared that assignment with you?

A. Correct.

Q. What did Investigator Whowell tell you about the assignment?

A. There had been a number of calls from citizens that had come into the police department in reference to receiving phone calls from a company that was soliciting funds for police departments. They wanted to know if this company was legitimate.

Q. What did Investigator Whowell tell you your mission was to determine about whether the [6] company was legitimate?

A. We were going to check to see if they were licensed to operate in the village.

Q. Did you check before you went out there or after you went out there or at all? Let me ask the right question. Did you check to see if they were licensed in the village?

A. Yes.

Q. How did you do that?
A. Through the building department.

Q. Did you do that before you went out there?
A. Yes.

Q. Did you do that or did Investigator Whowell do that?

A. Investigator Whowell did that.

Q. He did that and told you what his results were?
A. Correct.

Q. What did he tell you?

A. He indicated that he had done a check through the building department and the building department had no record of this company, Rudeway [7] Enterprises, being licensed to operate in the village.

Q. Now, at that time, April 19, 1994, was there any village ordinance of which you were aware which required that a business of the nature of Rudeway be licensed?

A. Every business that operates in the village has to be licensed.

Q. Is there a particular ordinance of which you are aware which includes that requirement?

A. I don't know the exact ordinance number.

Q. Well, how did you learn that every business has to be licensed?

A. It's common knowledge.

Q. Have you ever arrested any business operator who was not licensed in Arlington Heights?

A. I have been involved in other arrests for operating without a license.

Q. In each of those other arrests that you have been involved, was an LO ticket issued?

A. Yes.

Q. To issue an LO ticket, do you have to bring the person who is being issued a ticket down to the police station?

[8] A. Yes.

Q. Do they get fingerprinted?

A. No.

Q. Do they get photographed?

A. Yes.

Q. Do they have to post bond?

A. Yes.

Q. What other kind of offenses result in an LO ticket?

A. Soliciting without a permit, any of our park violations.

Q. Like littering in the park?

A. Littering in the park, being in the park after dark or drinking in the park, curfew violations.

Q. Is there a dog ordinance in Arlington Heights?

A. Yes.

Q. Do LO tickets get issued for a violation of the dog, whatever it is, ordinance?

A. I'm sure it's a local ordinance violation. I don't know if it specifically goes on a local ordinance ticket. That's handled by our animal wardens.

[9] Q. You have never arrested anybody for letting their dog mess on somebody else's lawn?

A. No, that's handled by our animal wardens.

Q. Is there a list or rule or some kind of written statement somewhere which tells you which ordinance violations get written up on an LO ticket?

A. No.

Q. Parking tickets don't get written up on an LO ticket?

A. No.

Q. Do parking tickets get issued by an Arlington Heights police officer?

A. Yes.

Q. What's that ticket called?

A. It's called a P ticket.

Q. What other kind of ordinance violations get written up on a P ticket?

A. Not having a village sticker, cars blocking the sidewalk, cars parked by § in fire lanes, cars parked in handicap zones, parking violations.

Q. Does P stand for parking?

[10] A. It could.

Q. Well, is there any offense for which a P ticket is issued that doesn't involve parking?

A. I believe some of the animal violations go on P tickets. If you have a stray dog running loose.

Q. Is there any written document of which you are aware which says which violations go on P tickets?

A. I'm sure there is some kind of directive indicating what violations can be written on P tickets.

Q. Back on April 19, 1994, were you involved in transporting Mr. Ricci from 8½ Dunton to the Arlington Heights Police Station?

A. Yes.

Q. Were you involved in the decision that Mr. Ricci would come from 8½ Dunton to the Arlington Heights Police Station?

A. How do you mean was I involved?

Q. Who made that decision?

A. I'd have to say it was a mutual decision between myself and Investigator Whowell.

Q. Why did you believe that Mr. Ricci [11] should be transported from 8½ Dunton to the Arlington Heights Police Station?

A. Well, it had been determined that he did not have a business license. He was going to be issued a local ordinance citation for not having a business license. There is paperwork that needed to be done to reference this charge along with a bond that had to be issued to reference this charge, neither of which we do on the street.

Q. Did you ever learn on April 19, 1994 that Mr. Ricci's wife was down at the Village Hall buying a business license?

A. No, I did not.

Q. Did you ever learn that Mr. Ricci's wife had purchased a business license?

A. I learned after that date that someone had come down to the Village and applied for a business license. I was unaware of who that person was.

Q. How did you learn that?

A. When the court date was coming up, we inquired with the building department as to whether or not this company had obtained the business license, at which time we were given a copy of an [12] application for a license that had been filled out on or about the same date.

Q. After a license is applied for, a business license is applied for, what happens in Arlington Heights?

A. The building department does an inspection of the premises and the fire department does an inspection of the premises.

Q. Do you know if those inspections were ever done of Rudeway Enterprises?

A. One of them was done.

Q. Which one?

A. I'm not 100 percent sure, but I believe it was the fire inspection that was done.

Q. Did you go to court on that case?

A. No, I did not.

Q. Why not?

A. Generally only one officer is needed in court, and since this was Investigator Whowell's case, he went to court on it.

Q. How long did that take to process Mr. Ricci on April 19, 1994?

A. He was with us for probably an hour.

Q. When you say he was with us, was he in [13] your presence that whole hour?

A. I'm talking about from the time that we left 8½ North Dunton until the time that he was released from this station on an I bond, he was with us for about an hour.

Q. From the time you left 8½ Dunton up until the time Mr. Ricci was released on an I bond on April 19, 1994, was Mr. Ricci free to leave?

A. No.

Q. He was under arrest, wasn't he?

A. If you want to call it that.

Q. Was he placed into a room that did not open from the inside when he was at the Arlington Heights Police Station?

A. He was in an interview room.

Q. Is that the kind of room that doesn't open from the inside when the door is closed?

A. Correct.

Q. Did you on April 19, 1994 hear Mr. Whowell make any comment about that it was taking too long to process Mr. Ricci?

A. No.

* * *

[15] Q. Well, when you went to 8½ Dunton, who is the first person you saw when you went into the building there?

A. Some big guy.

Q. Who spoke to him?

A. Investigator Whowell.

Q. Were you close enough to hear what Mr. Whowell said?

A. Uh-huh.

Q. You have to say yes or no for the [16] reporter.

A. Yes.

Q. What did you hear Mr. Whowell say?

A. He asked if we could be directed to Mr. Dugo.

Q. Did Investigator Whowell identify himself as a police officer?

A. Yes.

Q. How did he do that?

A. Verbally plus we carry ID's which were shown to the individual.

Q. You weren't in uniform?

A. No.

Q. What does your ID look like?

A. It's a star, it says Arlington Heights Police and there is a police officers commission card with our photograph on it.

Q. Did you tell the large gentleman or did Investigator Whowell tell the large gentleman why it was you wanted to see Mr. Dugo?

A. No.

Q. Were you directed to Mr. Dugo?

A. Yes.

Q. Did you know Mr. Dugo?

[17] A. Yes, Investigator Whowell did. He had had previous contact with him.

Q. Mr. Dugo was handcuffed when you found him?

A. He was advised that the reason we were there was because a warrant had been issued for his arrest. He was taken into custody at that time and, yes, he was handcuffed.

Q. What happened to Mr. Dugo?

A. We called for a marked squad car to come to the Dunton address. When the squad car arrived, I took Mr. Dugo downstairs to the waiting squad and placed him in the squad at which time Mr. Dugo went to the police department

and I went back up to the office.

Q. Why was it that you didn't transport Mr. Dugo to the police station?

A. We were not yet done with the business that we were attending to at the office.

Q. What other business were you attending to at the office?

A. We were trying to determine if the business itself was licensed within the village, and we were trying to determine if the police [18] organizations that they were § if they were authorized to solicit for the police organizations that they indicated they were soliciting for.

Q. Now, how had you learned § who had indicated they were soliciting for a police organization?

A. Mr. Ricci.

Q. Did you talk with Mr. Ricci before you took Mr. Dugo downstairs § strike that. Had you heard Mr. Ricci say anything before you took Mr. Dugo downstairs?

A. I don't recall at what point Mr. Ricci started talking with us.

Q. Other than seeing Mr. Ricci on April 19, 1994, have you ever seen him after that?

A. No.

Q. Had you ever seen him before that?

A. Not to my knowledge.

Q. Did you ever learn he had been a professional wrestler at one time?

A. No.

Q. When you came back upstairs after getting rid of Mr. Dugo or giving Mr. Dugo to the uniformed officers, where did you go?

[19] A. Over by Investigator Whowell.

Q. Where was Investigator Whowell?

A. By Mr. Ricci.

Q. Where in relation to the front door were those two men?

A. When you walk in the front door, there is a large office area where the employees have their phone stations set up for the calls that they are making for donations. There is another area separate from the main office area, it's like a small office, that's Mr. Ricci's office. When I came back upstairs, Mr. Ricci was in his office and Investigator Whowell was standing at the doorway.

Q. Now, to go from the front door to where you went to near Officer Whowell standing in the doorway, did you speak with anyone?

A. No.

Q. Did you have to go through any other kind of barrier?

A. No.

Q. Did you § how long did you stay outside Mr. Ricci's door before you left?

A. I need a little clarification. When you say how long did I stay outside his door before I [20] left, are you talking at the time when I brought Mr. Dugo downstairs?

Q. You brought Mr. Dugo downstairs, you came back upstairs, you saw Investigator Whowell standing outside of Mr. Ricci's door or in the doorway talking to Mr. Ricci and you went and stood next to Investigator Whowell. How long did you stay there before you left?

A. A few minutes.

Q. Did you say anything during that time?

A. No.

Q. Did you see any three-by-five index cards in the § on the premises?

A. Place was a mess. There was paper everywhere.

Q. Did you read any of the papers that you saw everywhere?

A. I didn't pay any attention.

Q. Did you pick up any of the papers you saw anywhere?

A. No.

Q. Did you see Investigator Whowell pick up any of the papers?

A. No.

* * *

MR. FLAXMAN: I have nothing further.

MR. KEHL: We will reserve signature.

FURTHER DEPONENT SAITH NOT.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

Deposition of Andrew Whowell

ANDREW WHOWELL, called as a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY MR. FLAXMAN:

[3] Q. What's your § state your full name and spell your last name.

A. First name is Andrew, last name is Whowell, W-h-o-w-e-l-l.

Q. What's your business or occupation?

A. I'm a police officer, the Village of Arlington Heights.

Q. For how long have you worked for the Village of Arlington Heights?

A. For approximately eight years.

Q. How old are you?

A. I'm 37.

Q. What did you do before working as a police officer for the Village of Arlington Heights?

A. I was a police officer for the City of Park Ridge for approximately two years, and prior [4] to that I was a police officer with the Village of Bartlett for approximately one year.

Q. Where is Bartlett?

A. Bartlett is a suburban community right outside of Elgin, Illinois.

Q. Why did you leave Bartlett?
A. Just job opportunities, career advancement.

Q. Why did you leave Park Ridge?
A. Same reasons.

Q. What's your present assignment in Arlington Heights?

A. I'm currently assigned as a criminal investigator to the criminal investigation department.

Q. What does it mean to be a criminal investigator?

A. Conduct all of the routine follow-up investigations into any matter that requires the attention or anything of follow-up nature.

Q. Are you familiar with the statutes of the State of Illinois?

A. Yes.

Q. Are you familiar with the ordinances of [5] the Village of Arlington Heights?

A. Yes, sir.

Q. Back in April of 1994, were you an Arlington Heights police officer?

A. Yes.

Q. And on April 19, 1994, do you recall what your assignment was?

A. Yes, I was assigned to the criminal investigation bureau of our department.

Q. Did you work alone or with a partner?
A. With a partner.

Q. Do you recall who your partner was on April 19, 1994?

A. Yes, Jerome Lehnert, L-e-h-n-e-r-t-

Q. Now, on April 19, 1994, did you have occasion to go to 8½ North Dunton Avenue?

A. Yes, I did.

Q. Why did you go there?

A. I went there basically for a two fold purpose. One to § I had an arrest warrant for an employee of Rudeway Associates as located at that location, and I also responded to that location to determine and ascertain if the company had a village business license.

[6] Q. So had you been assigned to determine and ascertain whether Rudeway had a business license?
A. Yes.

Q. Who gave you that assignment?
A. My supervisor.

Q. Who's that?
A. At the time it was Lieutenant John Fellman.

Q. Could you spell that?
A. F-e-1-1-m-a-n-n.

Q. Is he still employed by the Village of Arlington Heights?

A. Yes, he is.

Q. When did he give you that assignment?

A. I received this assignment approximately two or three days before I had received the arrest warrant for Mr. Dugo.

Q. Did Lieutenant Fellman give you this assignment verbally or in writing?

A. It was a verbal assignment.

Q. Where was he when he gave you the assignment?
A. In our office.

[7] Q. Was anybody else present when Lieutenant Fellman gave you this assignment?

A. I don't specifically recall.

Q. When he gave you the assignment, do you recall § can you tell us as best you can what he said?

A. Yes. He asked me to look into a company by the name of Rudeway & Associates. Our department had received various complaints in regards to them allegedly soliciting on behalf of area police departments for fundraisers, and Lieutenant Fellman asked me to check in to see if this was a legitimate company and if they were licensed by the Village of Arlington Heights.

Q. Now, what did you understand that assignment to be about checking into whether they were a legitimate company?

A. What would be a normal thing for me to do would be to check to see if they were licensed through the Village of Arlington Heights, if they were operating within our Village limits and to check and see what type of business they were operating. And that would just be a general inquiry I would make.

[8] Q. Well, when you went to 8½ North Dunton on April 19, 1994, what kind of business § did you have any understanding as to what kind of business Rudeway & Associates was operating?

A. Yes.

Q. And what was that?

A. They were a solicitation type firm, a fundraiser so to speak, my understanding was for area police departments.

Q. Was it your understanding that they would use telephones to make solicitation?

A. Yes, sir.

Q. Before § well, were there any laws of the State of Illinois or ordinances of the Village of Arlington Heights that you believed on April 19, 1994 related to the type of business that Rudeway & Associates was?

A. I'm not sure I understand your question.

Q. Well, was there § were there any laws of the State of Illinois that you believe that a telephone solicitation firm of the type you believed Rudeway was had to comply with?

A. There are again various requirements that they would have to go through statute to [9] register with various § attorney general that type of thing, that was my understanding. I made those inquiries to see if they had registered through the attorney general's office, if they had registered with any particular firm, and we were unable to substantiate that.

Q. Well, we'll get to that. What ordinances? You talked about having a Village of Arlington Heights business license?

A. That's correct.

Q. Back in April of 1994 or before going to Rudeway & Associates in April 19, 1994, did you review the ordinances of the Village of Arlington Heights?

A. Yes.

Q. Did you review them to see what ordinances were applicable to the type of business that you believe Rudeway & Associates was?

A. Yes, that every village § every business that operates within the Village of Arlington Heights would require to have a business license issued by the building department.

Q. Now, is there a particular ordinance that you found that contained that requirement?

[10] A. I believe the section number that was listed on the complaint or the quote LO ticket that was issued to them.

Q. Let's see if we can find the LO ticket.

A. If I'm not mistaken, that might be a copy that you have right there.

MR. FLAXMAN: Let's mark this as Exhibit 1. (WHEREUPON, said document was marked Plaintiff's Deposition Exhibit No. 1, for identification, as of 5/23/95.)

BY MR. FLAXMAN:

Q. Let me ask you to look at what's been marked as Plaintiff's Deposition Exhibit No. 1. Tell us what that is.

A. This is the LO-ticket citation that I had issued to Mr. Ricci.

Q. Was there a particular section of the Arlington Heights Village code that you cited him for having violated?

A. Yes, chapter 9 section 201 of the municipal code of Arlington Heights.

MR. FLAXMAN: Let's mark this as Plaintiff's 2. (WHEREUPON, said document was marked [11] Plaintiff's Deposition Exhibit No. 2, for identification, as of 5/23/95.)

BY MR. FLAXMAN:

Q. Let me show you what's been marked as Plaintiff's Exhibit 2. Does that contain § does Plaintiff's Exhibit 2 contain section 9-201 of the Arlington Heights Village Code?

A. Yes. I would only like to just preface, I'm not sure this is the most current section of the particular ordinance in question.

Q. Do you know if this was § what you are looking at, Exhibit 2 is the ordinance as it existed as it was in effect on April 19, 1994?

A. I'm not sure. I could not tell from just examining this particular document.

Q. Well, let's look at what's before you. Could you point out to us the language in 9 § is there language in 9-201 which requires every business in Arlington Heights to have a license?

A. Could you repeat that again.

Q. Is there language § could you point out to us where in 9-201, if you can find it in this version of the section, there is a requirement that every business in Arlington Heights have a license?

[12] A. Well, in reading section 9-201, it indicates, "it shall be unlawful for any person to conduct, engage in, maintain, operate, carry on or manage a business, occupation or activity, either by himself or through an agent, employee or partner, for which a license is required by any provision of this Code without first having obtained a license for such business, occupation or activity," and then there is a period there.

Q. Okay. Well, is there any provision of which you are aware of of the Arlington Heights Village Code which back in April of 1994 required that a solicitation type firm of the sort that Rudeway & Associates was had to have a license?

A. After I had conferred with my supervisor in regards to Rudeway & Associates, I was told after conferring with them that if they did not have a business license issued by the Village of Arlington Heights, that they should be cited based on this section.

Q. Okay. Who was your supervisor with whom you conferred about that?

A. Lieutenant John Fellman, Sergeant William Martin.

[13] Q. When did you confer with Fellman and Martin? Well, let's do it one at a time. When did you confer with Fellman about the applicability of the Arlington Heights Village Code to Rudeway & Associates?

A. That would have been on the 19th.

Q. Did you do that over the phone when you were at §

A. In person.

Q. When did you confer with Martin?

A. Same day.

Q. Who did you confer with first?
A. Basically I conferred with them together.

Q. Was Fellman the highest ranking police officer on duty at that time?
A. No.

Q. Who was?
A. I would only assume it was the chief of police.

[14] Q. Where did this conversation with Fellman and Martin take place?
A. In the criminal investigation bureau office of the police department.

Q. Where was Mr. Ricci at this time if you know?
A. I don't know.

Q. Was Mr. Ricci at the police station when you had this conference?
A. No.

Q. So you had a discussion with Fellman and Martin before you went out to §
A. That's correct.

Q. How long did that conversation take?
A. Approximately five to ten minutes.

Q. What else, if anything, did they tell you?
A. Nothing.

Q. Did you talk with Fellman and Martin about any requirement that Rudeway be registered with the attorney general?
A. Yes.

Q. What were you told about that? What was discussed about registering with the attorney general?

A. Well, this particular discussion that we had on the 19th involved the fact that I was going to be responding to Rudeway & Associates based on [15] the arrest warrant I had for Mr. Dugo, and that subsequent to me taking Mr. Dugo into custody, I was going to make an inquiry as to whether or not they were licensed to conduct business in Arlington Heights as required by ordinance. And it was then decided and it was § I indicated to Lieutenant Fellman that we would attempt to contact the head official at that company and if they were not in compliance that they would be issued an LO ticket.

Q. Now §
A. And that was done based on numerous complaints that our department had received in conjunction with their business.

Q. Did you ever personally receive any of those complaints?
A. Yes.

Q. How many?
A. I don't specifically recall. But to the best of my recollection, I would say I received between five and ten.

Q. Did you make any reports about any of those complaints?
A. No, sir, I did not complete any written documentation.

[16] Q. How did you receive those complaints?
A. By telephone.

Q. What was the nature of those complaints?
A. Citizens within the Village of Arlington Heights trying to ascertain if in fact this particular company was authorized to conduct any solicitation or funds on behalf of the Fraternal Order of Police in Arlington Heights, specifically Lodge 80.

Q. Now, is Lodge 80 § what is FOP Lodge 80 ?

A. That's Fraternal order of Police Lodge 80. That's the union that represents the sworn personnel within Arlington Heights.

Q. Are you a member of FOP Lodge 80?

A. Yes, sir.

Q. How long have you been a member?

A. Since my employment.

Q. Has FOP Lodge 80, to your knowledge, ever employed telephone solicitors to raise money?

A. No, sir.

Q. To your knowledge, have any telephone solicitors ever represented themselves as soliciting funds on behalf of FOP Lodge 80?

[17] A. I really don't know.

Q. Did you ever develop any information that Rudeway & Associates was purporting to solicit funds on behalf of FOP Lodge 80?

A. There were only allegations to that point.

Q. Did you recall § as you sit here now, do you recall the names of anybody who made those allegations, any of those allegations?

A. No, that was conferred to me. Again, I don't recall specifically any name that I personally dealt with that, but that information that I just related to you was also conveyed to me via Lieutenant Fellman.

Q. Well, as you sit here now, can you tell me whether there is any provision of the Arlington Heights Village Code of which you are aware which requires a telephone solicitation agency of the type Rudeway & Associates was back in April of 1994 to have a license?

A. I believe that Section 902 is applicable and addresses that.

Q. You mean 9-201?

A. That's correct, for a license [18] requirement.

Q. Other than 9-201 is there any provision of the Arlington Heights Village Code of which you are aware which requires a telephone solicitation business of the type Rudeway & Associates was to have an Arlington Heights business license?

A. I don't have any specific knowledge of that at this time, no.

Q. Did Mr. Lehnert know about your mission to Rudeway & Associates?

A. Yes.

Q. Was he present when you spoke with Lieutenant Fellman and Sergeant Martin?

A. To the best of my recollection, he was in the office. I don't know if he had any personal knowledge of the conversation that had taken place, because this was my particular assignment based on the arrest warrant that had been issued.

Q. Did you tell Investigator Lehnert what your assignment was?

A. I apprised him of what my intentions were once we responded to that location.

Q. Where were you when you told him what your intentions were?

[19] A. In the office of the investigation bureau.

Q. What did he say?

A. He accompanied me over there and understood what we were going to do.

Q. Did you go to 8½ Dunton Avenue in one car or two cars?

A. One car.

Q. Who drove?
A. Myself.

Q. What time did you get there, if you recall?
A. I don't specifically recall.

Q. Was it morning or afternoon?
A. To the best of my recollection, I think it would be in the afternoon. I could only tell you that it would probably help me if I could confer with the arrest sheet. You do have that on your desk here.

Q. That was my next question.

MR. FLAXMAN: Let's mark this as Exhibit 3. (WHEREUPON, said document was marked Plaintiff's Deposition Exhibit No. 3, for identification, as of 5/23/95.)

[20] BY MR. FLAXMAN:

Q. See if that refreshes your recollection. All right. Now, what was it that you wanted to say?
A. The only thing that I was going to indicate to you is that this is a copy of the general case report, at least it appears to be that. You have a document in front of you, specifically this one, that would have been the arrest sheet and that would indicate a time of arrest, and I would estimate that it would be prior to the time of arrest.

MR. FLAXMAN: Let's mark the arrest sheet then as Exhibit 4. (WHEREUPON, said document was marked Plaintiff's Deposition Exhibit No. 4, for identification, as of 5/23/95.)

BY MR. FLAXMAN:

Q. Let me show you § let's do this right. Let's show you what we have previously marked Exhibit 3. Is this the general case report concerning the § involving the arrest of Mr. Ricci?

A. Yes, sir.

[21] Q. Who prepared this Exhibit 3?
A. This was completed by myself.

Q. Now, Exhibit 4, is that the arrest slip?
A. That's correct.

Q. Who completed the arrest slip?
A. That's also myself.

Q. After looking at Exhibit 4, do you have a present recollection of about when it was that you arrived at Rudeway & Associates on April 19?
A. I would estimate the time to be approximately 3:30 in the afternoon.

Q. What kind of structure was 8½ Dunton or is 8½ Dunton?
A. I believe it's a two-story commercial building.

Q. Where did you go when you got there?
A. To the front entrance of 8½ North Dunton which is just it's a ground level that leads § there is a flight of stairs that leads up to the office area of that particular location.

Q. Did you walk up that flight of stairs to the office area?
A. Yes.

Q. What was the name on the door, if you [22] recall?
A. I don't specifically recall.

Q. Did you open the door and walk in?
A. I knocked on the door and then entered.

Q. Did somebody open the door or did you knock after § did you just open the door after knocking?
A. I recall knocking on the door and opening the door.

Q. Who was with you if anyone?

A. That would have been Investigator Lehnert.

Q. Did he go in before you or after you?
A. After me.

Q. Did either of you have drawn guns?
A. No, sir.

Q. What did you see when you got inside?
A. There was a heavyset gentleman sitting at a desk.

Q. As you sit here now, do you know his name?
A. No.

Q. Did you have a conversation with him?
A. Yes.

[23] Q. Who spoke to him, you or §
A. I did.

Q. What did you say to him and what did he say to you?

A. I identified myself as a police officer with Arlington Heights. I believe I also introduced my partner and indicated to the gentleman at the desk that I was there to speak to Mr. Dugo and also I wanted to meet with the person in charge of the company.

Q. What, if anything, did the heavyset gentleman say to you?

A. He directed me toward where Mr. Dugo's working station was and indicated that he would advise, I believe, the head official of the company that we were there.

Q. What happened next?

A. I was escorted over to the work station where Mr. Dugo was.

Q. Did Investigator Lehnert go with you?
A. Yes.

Q. When you say you were escorted, who, if anyone, escorted you?

A. The gentleman at the desk.

[24] Q. The heavyset person?
A. Uh-huh.

Q. You have to say yes or no.
A. Yes. I'm sorry.

Q. Then what happened?

A. Upon meeting and conferring with Mr. Dugo, I advised that I had a warrant for his arrest, and at that point I took him into custody.

Q. By taking him into custody, what did you do?

A. I asked him to step up from his desk. I handcuffed him.

Q. Did you handcuff him in front of him or behind him?

A. I handcuffed him with his hands behind his back.

Q. Did you double lock the handcuffs?
A. Yes.

Q. Then what did you do?

A. I believe at that particular point is where I met with Mr. Ricci.

Q. Where was Mr. Dugo when you went to meet with Mr. Ricci?

A. Mr. Ricci had walked up to Mr. Dugo's [25] work station.

Q. So Dugo was still there?
A. That's correct.

Q. Was that heavyset gentleman still there who you had seen at the front desk?

A. I don't recall.

Q. Was Investigator Lehnert there?
A. Yes.

Q. What happened when Ricci walked up?
A. Again, Mr. Ricci inquired as to who we were. We apprised him of our office. We indicated we had an arrest warrant for Mr. Dugo. I also indicated to Mr. Ricci that I was § I made general inquiries as to what type of business he had there, and I also inquired as to whether or not he had a business license from the Village of Arlington Heights.

Q. During this conversation, was Mr. Dugo present?
A. He was present at that particular point, yes.

Q. Investigator Lehnert was present also?
A. Yes .

Q. Then what happened?
[26] A. At that particular point I requested that Mr. § Investigator Lehnert escort Mr. Dugo downstairs. We had summoned a marked squad car to transport Mr. Dugo to the Arlington Heights Police Department. And that's when I § after Mr. Lehnert escorted Mr. Dugo downstairs, I continued my conversation with Mr. Ricci.

Q. Now, was the vehicle in which you had driven to 8½ Dunton the kind of vehicle in which you could have transported a prisoner?
A. Yes.

Q. So did you continue to talk with Mr. Ricci in the vicinity of Dugo's work area after Dugo §
A. As soon as he was escorted, I walked over to § Mr. Ricci walked me over to his office area.

Q. Where was that in relation to where Dugo's work area was?

A. I would describe it toward the rear portion of the office area there. It was a separate office with just one desk that was behind a closed door.

Q. Did you go through that door?
[27] A. I had § I stood in the doorway.

Q. What happened when you stood in the doorway?
A. Our conversation continued as to whether or not he had § his company had secured a business license.

Q. Did you ever tell him that, "If you are not registered with the attorney general's office," he was going to § you were going to lock him up?
A. No.

Q. Did you ever ask if he was registered with the attorney general's office?
A. Yes.

Q. Where were you when you asked him about having been registered with the attorney general's office?
A. In the doorway of his office.

Q. What did he say?
A. He indicated to me that he had been registered, I believe, with the Combined Counties Sheriff's Association which he felt entitled him to operate his business at that location, and that he would be in compliance and that that particular certificate would supersede any village ordinance [28] or licensing requirement that he might have.

Q. What did you tell him when he told you that?
A. I indicated to him that he would need to have a village license or a license issued by the Village of Arlington Heights to conduct business within the limits of Arlington Heights.

Q. Well, did you ever ask him any questions about the allegations that he had been soliciting money on behalf of FOP Lodge 80?

A. Not at that point, no.

Q. Did you ever ask him questions about FOP Lodge 80?

A. Yes.

Q. Where were you when you had that conversation?

A. That was after we transported him back to the Arlington Heights Police Department.

Q. So when you were at 8½ Dunton talking to Mr. Ricci, did you talk about anything else other than the business license?

A. Yes.

Q. What else did you talk about?

A. Made some general inquiries as to what [29] type of business he was conducting. He indicated that he was doing phone solicitation on behalf of various police departments, FOP Fraternal order of Police organizations, and that was basically the extent of our conversation.

Q. How long did you stay § after Mr. Dugo was taken away, how long did you stay at 8½ Dunton before you left?

A. I would estimate anywhere from 10 to 15 minutes.

Q. Did you look at any papers in that 10 or 15 minutes?

A. Did I specifically look at any papers?

Q. Yes. Right.

A. The only paper that I recall specifically looking at and handling was the certificate that he had from the Combined Sheriffs Association.

Q. What did you say when you saw that, if anything?

A. I indicated to him that he would still need the village license by Arlington Heights. And at that point he was searching through his personal effects in an attempt to locate that document which [30] would be the license.

Q. Was Investigator Lehnert with you at this time?

A. At the particular time that we are discussing here when I was looking at this particular document, I believe he was. He had only gone downstairs for one or two minutes and then he had come back upstairs.

Q. Did he stay in your presence after he came back from taking Mr. Dugo downstairs?

A. Yes.

Q. When you called for a marked squad car to take Mr. Dugo away, did you do that on the telephone or over the radio?

A. That was over the radio.

Q. Were you carrying a radio at that time?

A. Yes, sir.

Q. What kind of radio?

A. A Motorola hand-held radio.

Q. Was Mr. Ricci able to find an Arlington Heights business license?

A. No, sir, he was not.

Q. What happened when he was unable to find a business license?

[31] A. I told him that based on the village ordinance requirement I requested that he accompany me to the Arlington Heights Police Department and I explained to him the procedure what was going to take place, the fact that he would be issued a citation.

Q. When you explained the procedures that would be followed, did you say anything else other than that he would be issued a citation?

A. I indicated to him that § specifically that he would be issued a citation for not having a village license. I indicated to him that we would need to go to the police department to do that. I asked him if he was in a position to

accompany me there, and he indicated that he was. And that's when he was escorted back to the police department.

Q. When you say escorted back to the police department, what do you mean by that?

A. He was transported back to the Arlington Heights Police Department.

Q. Was he handcuffed?

A. No.

Q. Why couldn't he be issued a citation at 8½ Dunton?

[32] A. Based on department policies and procedures.

Q. What is that?

A. Specifically booking and processing procedures. They go hand in hand with a person being issued one of these citations.

Q. What are the § booking and what?

A. Processing procedures.

Q. What's the booking and processing procedure for someone who is issued an LO citation for not having a business license?

A. An LO citation would require a person to post bond which would § constitutes basically a custodial arrest. The person would have to be transported down to the police department where we would fill out an arrest sheet. They would have to be issued a P number which is a personal identification number for being issued such a citation. And then there is the purpose of bond. And our department policy does not allow us to take any type of monetary bond or to issue a recognizance bond on the street. That has to be done at the police department.

Q. Is there a general order which sets out [33] this procedure?

A. I believe so, yes.

Q. Are the Arlington Heights written rules of the police department called general order?

A. Yes.

Q. Do you happen to know which number?

A. I don't know.

Q. What's a P number?

A. A P number is a personal identification number. It's a so-called quota arrest number of a defendant in the specific case.

Q. Is that used for a computer system?

A. Yes.

Q. What other kinds of violations resulted in an LO, letters L-O, citation?

A. Any village ordinance violation other than parking complaints. I believe there are even some park district ordinances that will allow a different type of citation to be issued.

Q. Is there a general order which requires that any village ordinance other than parking that result in an LO citation?

A. I don't think it's a specific general order, no.

[34] Q. Is it an unwritten policy?

A. I would say that it is a policy.

Q. How did you learn about this policy, the unwritten policy?

A. Well, the policies are dictated through correspondence in the department, not specifically general orders. It could be a memorandum or an administrative directive.

Q. Do you recall ever reading a memorandum or administrative directive saying LO citation requires posting a bond transporting to the police department?

A. Yes. There is a set procedure that's documented by the police department in the issuances of LO tickets.

Q. Just to be clear, you could not have, consistent with the policies and procedures of the Village of Arlington Heights, have issued Mr. Ricci a citation for not having a business license other than the LO citation?
[35] A. That's correct.

Q. And you could not have issued the LO citation without requiring Mr. Ricci to come to the police station?
A. That's correct.

Q. When you went to the § well, when you went to the police station with Mr. Ricci and § who else accompanied you to the police station?
A. Investigator Lehnert.

Q. Where did you go when you got to the police station?
A. Into the criminal investigation bureau office of the department.

Q. Where did you put Mr. Ricci?
A. He was placed in an interview room.

Q. Was he locked in?
A. The door does lock, yes.

Q. Does it lock all the time? Whenever that door is closed can it only be opened from the outside?
A. That's correct.

Q. Was there a reason why he was placed into a locked room?
A. It is procedure based on trying to confine people's movements within the police department for security reasons.

Q. Was Mr. Ricci free to leave the police department when you got to the police station [36] before he was processed?

A. No.

Q. What kind of paperwork did you have to fill out in connection with the LO citation?
A. There would specifically be the arrest sheet.

Q. Do you know § the arrest sheet is which exhibit if it is?

MR. KEHL: 4.

BY THE WITNESS:
A. That's 4, this particular document.

BY MR. FLAXMAN:

Q. What else had to be filled out, if anything?
A. The LO citation itself.

Q. That's Exhibit 1?
A. That's correct.

Q. Anything else?
A. A bond receipt.

Q. Anything else?
A. That would be the only paperwork that would need to be completed.

Q. Did you complete all that paperwork that you just described to us?
[37] A. I'm not sure who filled out the bond receipt. It could have been myself.

Q. How long was Mr. Ricci at the police station while this paperwork was filled out?
A. Say approximately one hour.

Q. What shift were you working that day, the day Mr. Ricci was arrested?
A. I believe I was assigned to the day shift.

Q. What are the hours of the day shift?
A. 8:30 to 4:30.

Q. Is there roll call after the 4:30 shift and before the next shift?
A. Yes, sir.

Q. Could you describe to us what roll call is.
A. Just a basic meeting between shifts and supervisors. Normally that roll call is held two times a day, and that's where general information is discussed and related to other investigators within the department.

Q. How far from where Mr. Ricci was was roll call held on April 19, 1994?
A. The adjacent room.

[38] Q. So was Mr. Ricci close enough that if he was there during roll call he could have heard parts or he could have heard roll call?
A. Yes, he could have heard parts of the roll call.

Q. Do you remember ever telling Mr. Ricci that you were going to check to see if he had a business license?
A. I don't specifically recall saying that, no.

Q. Did you ever check to see whether a business license had been issued for Rudeway & Associates?
A. Yes.

Q. When did you do that?
A. Prior to going to that location.

Q. How did you check?
A. I contacted the business department of the Village.

Q. Did you ever check to see whether § well, did you ever check to see whether Rudeway & Associates had to be registered with the attorney general?
A. I'm not sure if they are required to be [39] licensed by or registered with the attorney general's office.

Q. Did you do any checking in that regard?
A. Yes, sir, I did.

Q. When did you do that?
A. Again, prior to going to that location on the 19th.

* * *

Q. While Mr. Ricci was at the police station on April 19, 1994, did you ever tell anyone that you were concerned about how long it was taking to process him?
A. I'm sorry. Could you repeat that.

Q. While Mr. Ricci was at the police station, did you ever complain § did you ever state to any other police officer that, "It was taking too long to process Mr. Ricci. That we should hurry up and get this done"?
A. Not at all, no, sir.

[41] Q. As you sit here now, do you believe that it was taking too long § that it took too long to process Mr. Ricci at the police station?
A. No, sir.

Q. Why is that?
A. For the time frame in which he was at the police department there was no unnecessary delay in processing him or releasing him from the police department.

Q. After you got back to § after § from the time you saw Mr. Ricci at 8½ Dunton until the time that you got back to the police station, other than the radio call to get a car to pick up Mr. Dugo, did you talk with any other police officers aside from Investigator Lehnert?
A. Did I have any communication with any officers during that time?

Q. Yes.
A. Yes.

Q. Who did you §

A. That would be the other investigators at the police department.

Q. Before you got to the police department, did you talk to Lieutenant Fellman?
[42] A. No, sir.

Q. At the police department when you got back, did you talk with Lieutenant Fellman?
A. Yes, sir.

Q. Where did that conversation take place?
A. Again in the office of the criminal investigation bureau.

Q. Who else was there?
A. I don't specifically recall. I recall Sergeant Martin being there, Investigator Lehnert, myself, and there were other investigators present, because during this time was when the roll call was.

Q. Did you talk about your trip to Rudeway & Associates?
A. I had apprised him as to what transpired, yes, sir.

Q. What did you tell him?
A. I indicated to Mr. Fellman and to Sergeant Martin that in fact we had responded to 8½ North Dunton, that I had served the arrest warrant on Mr. Dugo, and that I had asked Mr. Ricci to accompany us back to the police department and that I was in the process of issuing him a citation [43] for not having a business license.

Q. What, if anything, did Mr. Fellman § Lieutenant Fellman tell you?
A. Nothing.

Q. Did you talk with § how about Sergeant Martin, did he say anything?

A. The only thing that I requested of Sergeant Martin was that § I indicated that based on the surrounding circumstances in this particular case and the fact that Mr. Ricci had been cooperative, I asked him for permission, again procedure, if he would authorize a recognizance bond for Mr. Ricci. He indicated he would in fact do that.

Q. Did you ever learn that on April 19, 1994 someone was purchasing a business license for Rudeway & Associates?
A. No. I subsequently received information that I believe Mr. Ricci had his wife respond over and make an application for that license. I'm not sure what date that was. I don't recall.

Q. You never heard a police officer say that Ricci's wife was down at the village trying to get a license right at the time you had Ricci in [44] custody?
A. I don't recall that, no, sir.

Q. Had you ever ran an arrest before for a violation of the Arlington Heights ordinance about business licenses?
A. I have been part of an arrest, yes.

Q. How many?
A. I would estimate between three and ten.

Q. Were they telephone solicitation businesses?
A. I don't recall, sir.

Q. Do you recall what happened to those charges in court?
A. In regard to Mr. Ricci?

Q. In regard to any of those other arrests.
A. I would only tell you that it would be a typical situation that if someone was issued a citation for this that if they were in compliance and in fact secured a business license that the charges would be dismissed by the village prosecutor in court.

Q. Did you ever believe that's what would happen with Mr. Ricci's case?

[45] A. Yes

Q. Did you ever see Mr. Ricci again after April 19, 1994?

A. Not to my recollection.

Q. When you were processing Mr. Ricci on April 19, '94, was it your expectation that he would go get a business license and go to court and the complaint would be dismissed?

A. Yes.

Q. Did you ever think that what you were doing was really stupid?

A. No.

Q. Why not?

A. It would appear § it's my opinion there is various reasons why the village requires a particular business to have a license, and that's for fire safety, it's for § to make sure the structure is sound. So in no way, shape or form do I think it's foolish, no.

Q. Did you have an understanding about why it is that an LO ticket that requires going to the police station is the procedure used when giving a citation for not having a business license rather than the type of citation that's used for a parking [46] ticket?

A. Well, yes. Here we are specifically dealing with a person responsible for a business, and based on the violation and the follow-up procedures, there is accountability factors to make sure that people are going to come into court, and therefore, there is an arrest sheet and that's why the department policy is that it's a custodial arrest.

* * *

Q. Did you ever tell Mr. Ricci on April 19, 1994 that it was taking longer to process him than it should have because it was roll call?

A. No.

Q. Did you ever § when you were at Rudeway & Associates on April 19, 1994, did you ever see any three-by-five index cards?

A. Yes.

[48] Q. Where did you see them?

A. They were throughout the office area at various work stations of employees there.

Q. Did you look at any of the writing that was on any of those index cards?

A. Specific cards, no, sir.

Q. Did you pick any cards up?

A. No.

Q. Did you see Officer Lehnert pick up any of those cards?

A. No, sir.

Q. What's Lieutenant Fellman's present assignment, if you know?

A. Yes. He's the commander of the patrol division.

Q. Promotion?

A. Recent promotion, yes, sir.

Q. What shift does he work?

A. He's on the day shift.

Q. Have you gotten promoted since §

A. No, sir.

Q. Let me finish the question. § since you arrested Mr. Ricci?

A. No.

[49] MR. FLAXMAN: I have nothing further.

MR. KEHL: We will reserve signature.

FURTHER DEPONENT SAITH NOT.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

PLAINTIFF'S LOCAL RULE 12(n) STATEMENT

Plaintiff submits the following in response to defendants' Local Rule 12(m) statement:

Contention: 1. On April 19, 1994, there were in full force and effect the following ordinances dully enacted by the VILLAGE OF ARLINGTON HEIGHTS, Illinois:

Section 14-3001 Licensing of Businesses. The places of businesses hereinafter enumerated in Section 14-3002 shall be licensed in accordance with the provisions of this Code. The license fee for each business shall be that set forth in Section 14-3002. All businesses so licensed shall comply with the general licensing provisions of Chapter 9 of this Code, and shall comply with all ordinances of the Village of Arlington Heights relating to the use and occupancy of the premises in which such businesses are located. The Village Manager may direct appropriate Village officers to make such inspections of the places of business of said licensees as he may deem necessary from time to time for the purpose of enforcing all the applicable ordinances of the Village of Arlington Heights. Such inspections shall be in addition to those required under other provisions of the ordinances of the Village and other sections of this Code.

Section 14-3002 Licensed Businesses and Fees.

(a) The license fees for the businesses listed below shall be determined based on the size of the business operation in accordance with the following standardized calculation fee schedule:

$100.00	under 1,000 square feet*
$150.00	1,001-5,000 square feet*
$300.00	5,001-12,000 square feet*
$600.00	12,001 square feet* and over

(*square feet = the total building square footage including retail areas and indoor storage areas)

* * *

Any and all business enterprises not named elsewhere in this Code.

Section 9-201 License required. Except as otherwise provided in Section 9-202 of this Code, [exemption for double licensing], it shall be unlawful for any person to conduct, engage in, maintain, operate, carry on or manage a business, occupation or activity, either by himself or through an agent, employee or partner, for which a license is required by any provision of this Code without first having obtained a license for such business, occupation or activity. Any person violating this section shall be fined not less than Five Dollars ($5.00) nor more than Five Hundred Dollars ($500.00) for each offense. A separate offense shall be deemed committed on each day during or on which a violation occurs or continues.

Response: Agree.

Contention: 2. On April 19, 1994, RANDALL RICCI, as principle of Rudeway Enterprises, was operating a business at 8½ North Dunton, Arlington Heights, Illinois.

Response: Agree.

Contention: 3. On April 19, 1994, at approximately 3:00 p.m., Arlington Heights police officers Andrew Whowell and Jerome Lehnert entered the business premises at 8½ North Dunton to serve an arrest warrant on Daniel Dugo, an employee of Rudeway Enterprises.

Response: Agree that serving the arrest warrant was one of the reasons for the entry to 8½ North Dunton. Another reason for the entry to 8½ North Dunton was to put Rudeway Enterprises out of business. (Ricci Dep. 27, 41.)

Contention: 4. While on the business premises, ANDREW WHOWELL inquired of RANDALL RICCI as to whether RANDALL RICCI had a VILLAGE OF ARLINGTON HEIGHTS business license.

Response: Agree. Before making this inquiry, Whowell told Ricci that "if your people aren't registered with the Attorney General's office to raise funds I'm going to lock everybody in this place up." (Ricci Dep. 27.)

Contention: 5. While it had been determined by ANDREW WHOWELL previous to his entry into 8½ North Dunton that neither RANDALL RICCI nor Rudeway Enterprises had a VILLAGE OF ARLINGTON HEIGHTS business license, RANDALL RICCI proceeded to look through his office for such a license and determined that he did not have one.

Response: Agree

Contention: 6. While on the business premises of 8½ North Dunton, neither Officer Whowell nor Officer Lehnert physically searched through any of the papers or effects of RANDALL RICCI or Rudeway Enterprises.

Response: Disagree. Ricci saw Whowell inspect a 3 by 5 index card, which contained a sales lead. (Ricci Dep. 25.)

Contention: 7. Neither Officer Lehnert nor Officer Whowell entered any portion of the business premises designated as non-public.

Response: Disagree. The entirety of the business premises are non-public. (Ricci Dep. 22.)

Contention: 8. RANDALL RICCI was taken to the VILLAGE OF ARLINGTON HEIGHTS Police Department by officers Whowell and Lehnert and charged with violating VILLAGE OF ARLINGTON HEIGHTS Code of Ordinance Section 9-201.

Response: Agree.

Contention: 9. At the police station, RICCI was formally booked and placed in an interview room while a local ordinance citation and bond were prepared.

Response: Agree. Ricci was not free to leave the interview room (Whowell Dep. 36), but was under arrest. (Lehnert Dep. 13.)

Contention: 10. Upon the approval by Sergeant Martin, RANDALL RICCI was released on an I-bond.

Response: Agree.

Contention: 11. RANDALL RICCI was at the VILLAGE OF ARLINGTON HEIGHTS Police Department for only approximately one hour while he was booked, his paperwork was processed, and his bond approved and issued.

Response: Agree. The entire paperwork incident to the arrest consisted of the "LO" citation and bond receipt. (Whowell Dep. 36.)

Contention: 12. Subsequent to his arrest, RANDALL RICCI'S wife procured a VILLAGE OF ARLINGTON HEIGHTS business license.

Response: Disagree. Ricci's spouse secured the business license while Ricci was in custody. (Ricci Dep. 36.) At all times relevant, Whowell's expectation was that as a result of being arrested, plaintiff would obtain a business license and the charges would then be dismissed. (Whowell Dep. 44.)

Contention: 13. The charge against RANDALL RICCI for violating Section 9-201 was dismissed after it was established that Rudeway Enterprises had, in fact, subsequently obtained a business license.

Response: Agree.

ADDITIONAL MATERIAL FACTS

1. Plaintiff is the principal of a telemarketing firm that sells advertising and raises funds for a charitable organization. (Ricci Dep. 7-8.)
2. In April of 1994, plaintiff's business was located at 8½ Dunton in Arlington Heights, Illinois. (Ricci Dep. 9.)

3. At that time, the firm was selling advertising in the Combined Counties Police Association's newspaper and publication, *The Illinois Police and Sheriff News*. (Ricci Dep. 10.)

4. In April of 1994, the Arlington Heights police department began to receive complaints about telephone solicitations being conducted by plaintiff's business. (Fellman Dep. 10.) The matter was assigned to defendant Whowell, an Arlington Heights police detective. (Fellman Dep. 10.)

5. On April 19, 1994, defendant Whowell went to plaintiff's place of business. (Whowell Dep. 7.)

6. The ostensible purpose of the trip was to execute an arrest warrant on one of plaintiff's employees. (Lehnert Dep. 4.)

7. The underlying purpose of the mission to Rudeway Enterprises was to gain entry into plaintiff's place of business to acquire some evidence that could be used to shut down the the operation. (Ricci Dep. 27, 41.)

8. While in the non-public area of plaintiff's place of business (Ricci Dep. 22), Whowell walked around "exploring" and examined at least one document. (Ricci Dep. 25.)

9. After entering plaintiff's place of business, Whowell learned that plaintiff's business was wholly in accord with Illinois statutes. (Ricci Dep. 37.)

10. It is the official policy of the Village of Arlington Heights for its police officers to make full custodial arrests for violations of the fine-only business license ordinance. (Fellman Dep. 36.)

11. Arlington Heights authorizes its police officers to issue citations, without requiring a full custodial arrest, in ordinance violation cases involving parking tickets, (Fellman Dep. 18.)

12. Arlington Heights maintains its full custodial arrest policy in ordinance violation cases involving business licenses because administrative convenience. (Fellman Dep. 32.)

13. At all times, the arresting officers knew that the ordinance violation charge against plaintiff would be dismissed when he went to court. (Whowell Dep. 44.)

14. The stress of the arrest exacerbated plaintiff's preexisting psychological problems with depression and lack of self-esteem. (Ricci Dep. 51.)

/s/ Kenneth N. Flaxman
an attorney for plaintiff

(5)

No. 97-501

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

RANDALL RICCI,

Petitioner,

v.

VILLAGE OF ARLINGTON, HEIGHTS
A MUNICIPAL CORPORATION,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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Suite 1850
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Counsel for Petitioner

37 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the reasonableness clause of the Fourth Amendment incorporate the common law rule prohibiting warrantless arrests in misdemeanor cases that do not involve a breach of the peace?

2. May a municipality, consistent with the reasonableness clause of the Fourth Amendment, require its police officers to make full custodial arrests for an alleged violation of a fine only license ordinance "in order to ensure compliance with the ordinance?"

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BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the Court of Appeals (Pet.App. 1-9) is reported at 116 F.3d 388. The opinion of the district court (Pet.App. 11-19) is reported at 904 F.Supp. 828.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court was invoked under 28 U.S.C. §1254 in a petition filed on September 17, 1997. The Court granted the petition on January 9, 1998.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Petitioner Randall Ricci is the principal of a telemarketing firm. In April of 1994, the Arlington Heights, Illinois police department received complaints about the business practices of petitioner's firm. (App. 18.) The complaints were about "high pressure to contribute . . . on behalf of the Arlington Heights Police Department." (App. 20.) The police department had not been soliciting contributions (App. 19) and the matter was assigned to police officer Whowell, who was instructed to determine if petitioner's firm had been issued a business license by the municipality.[1] (App. 19-20.)

After Whowell discovered that petitioner's firm had not been issued a license (App. 70) he was instructed by his supervisor Commander Fellman "to check with the principals of the organization should he ever have occasion to go over there." (App. 23.) Fellman instructed Whowell to arrest petitioner if he could not produce a valid municipal business license. *Id.*

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1. Section 14-3001 of the Arlington Heights Village Code provides that "businesses hereinafter enumerated in Section 14-3002 shall be licensed in accordance with the provisions of this Code." Section 14-3002 contains an extensive list of businesses and includes a catch-all provision covering "[a]ny and all business enterprises not named elsewhere in this Code."

On April 19, 1995, several weeks after the first complaint (App. 18) and two or three days after he had been assigned to the case (App. 49), Whowell and officer Lehnert went to petitioner's office to execute an arrest warrant on one of petitioner's employees.[2] After executing the warrant, the officers reaffirmed that petitioner did not have a municipal business license. (App. 65.)

Respondent's long standing policy[3] is to require full custodial arrests of persons suspected of violations of the business license ordinance. (App. 34.) As explained by Commander Fellman, "If we have a violation of ordinance, the suspect is arrested, brought to the station, charged, bonded, and given a court date." (App. 23) Commander Fellman explained that the municipal policy was required because "[w]e have no instrument designed for citing them in the field." (App. 31.)

As required by the municipal policy, Whowell and Lehnert placed petitioner under arrest (App. 42) and transported him to the police station where they locked him into an interrogation room. (Pet.App. 12.) Petitioner, who was not free to leave, (App. 42), remained in the locked interrogation room (App. 68) while the officers prepared an ordinance violation complaint. (App. 66.) Petitioner was released on a personal recognizance bond after about an hour of detention. (Pet.App. 15.)

Petitioner's spouse obtained the business license while petitioner was in police custody, (Pet.App. 12), and the

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2. This arrest warrant was unrelated to petitioner's business.

3. The policy has been in effect since at least 1973, when Commander Fellmann joined the Arlington Heights Police Department. (App. 17, 30-31.)

ordinance charge was dismissed at plaintiff's first court appearance. (Id.) This disposition has been anticipated by the arresting officers, who knew that the ordinance violation charge would be dismissed when petitioner appeared in court with a business license. (App. 73-74.)

Following the conclusion of state court proceedings, petitioner brought an action under 42 U.S.C. §1983 in the district court against the arresting officers and respondent, the Village of Arlington Heights. bond One of petitioner's claims was that respondent's policy of requiring full custodial arrests for violation of its fine-only business license ordinance resulted in his unreasonable seizure. Amendment.[4] (Complaint, par. 15, App. 5.) Petitioner urged that a full custodial arrest for a fine-only ordinance violation not involving a breach of the peace is contrary to the Fourth Amendment. *Id.*

Respondent moved for summary judgment, admitting that its municipal policy was to require full custodial arrests for alleged violations of its business license ordinance. (Pet.App. 12.) The district court found that the arresting officers had visited petitioner's business "to gather evidence to put him out of business," (Pet.App. 14), but concluded that

4. In addition to the municipal liability claim before this Court, petitioner asserted two claims against the individual officers: first, that he had been arrested without probable cause and second, that, before arresting him, the officers had conducted an unreasonable search of petitioner's business. The district court found against petitioner on the probable cause to arrest issue and held that a trial was required to resolve the search issue. (Pet.App. 15-16.) Neither claim is at issue in this proceeding: the parties settled the unreasonable search claim and petitioner did not challenge the probable cause ruling on appeal.

"the Village policy requiring custodial arrests for violations of its business-license ordinance does not offend the Fourth Amendment." (Pet.App. 19.)

The court of appeals affirmed, holding that a municipality may require full custodial arrests for violation of a fine only business license ordinance to "prevent[] Ricci from continuing to violate a law" (Pet.App. 7) and "in order to ensure compliance with the ordinance and in order to complete the necessary paperwork." (Id.) In the view of the Seventh Circuit, petitioner could not complain about the reasonableness of his warrantless arrest because "a neutral magistrate following Illinois law would surely have issued a warrant in this case."[5] (Pet.App. 8 n.1.)

SUMMARY OF ARGUMENT

The Court's teachings suggest two alternative starting points for assessing the constitutional reasonableness of respondent's municipal policy of requiring full custodial arrests to initiate enforcement proceedings of its fine-only business license ordinance: The first is to consider the "traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing." *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). The second, applied in *Delaware v. Prouse*, 440 U.S. 648, 654 (1979), is to assess the costs and benefits of the policy. Each approach in this case yields the same result: respondent's policy resulted in an unreasonable seizure.

When the Fourth Amendment was adopted, a peace officer could lawfully make an arrest for a non-felony only

5. The court of appeals also stated that it would not consider petitioner's argument "that no neutral magistrate would have issued a warrant in this case" because petitioner had not raised this argument in his brief. (Pet.App. 8.)

when the offense had been committed in his presence and involved a breach of the peace. *Carroll v. United States*, 267 U.S. 132, 156 (1925). The overwhelming majority of states continue to circumscribe an officer's power to make a warrantless arrest in non-felony cases. These contemporary translations of the common law rule provide strong evidence that respondent's policy of using warrantless custodial arrests to initiate prosecutions for violations of its fine-only business ordinance is constitutionally unreasonable.

Respondent has sought to justify its mandatory arrest policy because its officers do not carry ordinance citation forms. This is a wholly inadequate basis on which to require custodial arrests — it would not be difficult for respondent to create a ticket book to issue field citations.

The Seventh Circuit upheld respondent's mandatory arrest policy as necessary "in order to ensure compliance with the ordinance." (Pet.App. 7.) Other jurisdictions rejected this rationale long ago, because "it is to all intents and purposes a separate and independent punishment for the offenses specified," *Judson v. Reardon*, 16 Minn. 431, 434 (1871) and because vesting officers with such power is "liable to great abuses." *Pow v. Beckner*, 3 Ind. 474, 478 (1852).

The appropriate translation of the common law limitations on warrantless arrests in non-felony cases to fine-only infractions is that a custodial arrest is constitutionally unreasonable unless there is an actual or threatened breach of the peace: the Fourth Amendment should not be warped to permit arrests "to ensure compliance."

ARGUMENT

-I-

At common law, an officer "was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence." *John Bad Elk v. United States*, 177 U.S. 529 (1900). The officer must be "apprised by any

of his senses that a crime is being committed." Wilgus, *Arrest Without Warrant*, 22 Mich.L.Rev. 673, 680 (1924). The common law rule further restricted the officer's power to make an arrest without warrant to "those cases where the public security requires it; and this has only been recognized in felony and in breaches of the peace committed in presence of the officer." *In the Matter of Sara May*, 41 Mich. 299, 304, 1 N.W. 1021, 1024 (1879).

Although the Court has acknowledged the common law rule on several occasions,[6] it has yet to consider whether, and under what circumstances, an arrest without warrant for a minor offense contravenes the Fourth Amendment.

The Court considered whether an arrest without warrant for a felony contravenes the Fourth Amendment in *United States v. Watson*, 423 U.S. 411 (1976). In upholding such warrantless arrests and continuing the common law rule, the Court observed that "[t]he balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact." Id. at 421.

A felony is quite different from the fine only infraction in this case. Here, petitioner was arrested because he had not applied for a business license.[7] Petitioner did not refuse to

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6. *See, e.g., Kurtz v. Moffitt*, 115 U.S. 487, 498-99 (1885); *Carroll v. United States*, 267 U.S. 132, 156-57 (1925); *Davis v. United States*, 328 U.S. 582, 588 n.4 (1946); *United States v. Watson*, 423 U.S. 411 (1976).

7. Petitioner argued in the district court that his business was not subject to the municipal licensing ordinance and that the ordinance did not authorize the arrest of a corporate officer (Pet.App. 15-16.) The district court resolved these issues against petitioner. *Id.* Neither question is at issue in this Court.

accept a summons,[8] but was arrested because of a municipal policy requiring a full custodial arrest to initiate a judicial proceeding to enforce the ordinance. Moreover, although the potential punishment for petitioner's offense was a fine, the arresting officers knew that no sanction would be imposed if petitioner purchased a license. (App. 73-74.) Petitioner's spouse obtained the license while petitioner was in police custody (Pet.App. 12) and, as the arresting officers had expected, the ordinance charge was dismissed at petitioner's initial court appearance. *Id.*

In his concurring opinion in *Gustafson v. Florida*, 414 U.S. 260 (1973), Mr. Justice Stewart observed that "[i]t seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments." 414 U.S. at 266-67 (concurring opinion). The motorist in *Gustafson*, however, had conceded the reasonableness of his custodial arrest for failure to have his vehicle operator's license in his possession, 414 U.S. at 262, and the Court did not consider the merits of what Mr. Justice Stewart had described as a "persuasive claim."

This case provides the Court with an opportunity to consider whether there are any "constitutional limits upon the use of 'custodial arrests' as the means for invoking the criminal process when relatively minor offenses are involved," *Robbins v. California*, 453 U.S. 420 (1981), (Stevens, J., dissenting opinion), If the Fourth Amendment imposes any limits on the use of custodial arrests to initiate enforcement proceedings of a fine-only ordinance, the municipal policy

8. *Compare Kirchoff v. Flynn*, 786 F.2d 320 (1986) (full custodial arrest for walking dogs off-leash and feeding pigeons because citizen refused to accept citation).

that required petitioner's arrest cannot stand.

-II-

The Court's teachings suggest two alternative starting points for assessing the constitutional reasonableness of respondent's municipal policy: the first is to consider the "traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing."[9] *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). The second is to assess the costs and benefits of the policy.[10]

9. See, e.g., *Hester v. United States*, 265 U.S. 57, 58 (1924) (distinction between open fields and dwelling "is old as the common law"); *Henry v. United States*, 361 U.S. 98, 100 (1959) ("The requirement of probable cause has roots that are deep in our history."); *Pierson v. Ray*, 386 U.S. 547, 555 (1967) (considering common law rules of immunity for arresting officers); *United States v. United States District Court*, 407 U.S. 297, 316 (1972) (evaluating Fourth Amendment in light of *Leach v. Three of the King's Messengers*, 19 How. St. Tr. 1001, 1027 (1765)); *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975) ("Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents."); *Payton v. New York*, 445 U.S. 573, 591 (1980) (considering "common law on the question whether a constable had the authority to make warrantless arrests in the home on mere suspicion of a felony"); *California v. Hodari D.*, 499 U.S. 621 (1991) (common law principles of arrest); *Steagald v. United States*, 451 U.S. 204, 217 (1981) ("The common law may, within limits, be instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable."); *Whren v. United States*, 517 U.S. 806 (1996) (adhering to "the traditional common-law rule that probable cause justifies a search and seizure").

10. See, e.g., *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602, 618 (1989) ("Thus, the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests,'" quoting *Delaware v. Prouse*, 440 U.S.

Each approach in this case yields the same result: respondent's policy resulted in an unreasonable seizure.

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When the Fourth Amendment was adopted, a peace officer could lawfully make an arrest for a non-felony only when the offense had been committed in his presence and involved a breach of the peace. *Halsbury's Laws of England,* vol. 9, part. III, 117 (2d ed. 1933), cited (1st ed. 1909) in *Carroll v. United States,* 267 U.S. 132, 156 (1925). "Authority to arrest even for a misdemeanor amounting to a breach of peace committed in the officer's presence appears to be limited to the duration of the emergency: to keep it from starting, to stop it after it starts, to keep it from starting again." Coates, *The Law of Arrest in North Carolina,* 15 N.C.L.Rev 101, 110 (1936).

The common law rule is illustrated in *Coupey v. Henley,* 2 Esp. 540, 170 Eng.Rep. 448 (C.P.1797). There, one of the participants in a scuffle had complained to the constables

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648, 654 (1979).); *Griffin v. Wisconsin,* 483 U.S. 868, 873 (1987) (evaluating "special needs" of probation system); *New York v. Berger* 482 U.S. 691, 702 (1987); (criteria for warrantless inspection of regulated business); *Bell v. Wolfish,* 441 U.S. 520, 558 (1979) (reasonableness under the Fourth Amendment "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails"); *New Jersey v. T.L.O.,* 469 U.S. 325, 337 (1985) ("what is reasonable depends on the context within which a search takes place"); *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976) ("In delineating the constitutional safeguards applicable in particular contexts, the Court has weighed the public interest against the Fourth Amendment interest of the individual.")

who "without any warrant or other authority" arrested the plaintiff. The officers had not witnessed the incident. In directing a verdict for the plaintiff in a false arrest case, the Court stated as black letter law that "a constable is not warranted to take a person into custody for a mere assault, unless he is present at the time, and interposes with a view to prevent a breach of the peace."[11]

At common law, arrest without warrant was unheard of for fine-only ordinance violations, which were enforced by an action of debt or assumpsit. 9A McQuillan, *Municipal Corporations* (3d ed 1996), §27.05. "[R]ecoveries for violation of an ordinance were to be by 'action of debt,' and the first process was a 'summons or warrant for the arrest of the offender,' as the 'trustees' might by ordinance determine." *City of Greeley v. Hamman,* 12 Colo. 94, 98 (1888).

The common law limitations on warrantless arrests in non-felony cases were uniformly followed and reaffirmed through the mid-nineteenth century. *See, e.g., Pow v. Beckner,* 3 Ind. 475 (1852); *In re Kellam,* 55 Kan. 700, 41 P. 960 (1895); *Pesterfield v. Vickers,* 43 Tenn. 205 (1866); *State v. Lutz,* 85 W.Va. 330, 101 S.E. 434 (1919).

One of the first attempts to change the common law rule that secured judicial approval involved a Missouri statute applicable to Kansas City that allowed warrantless arrests in misdemeanor cases on the same basis as in felony cases. *State v. Grant,* 76 Mo. 236, 243 (1882). The Missouri Supreme Court upheld a subsequent enactment that extended this rule to St. Louis, relying on a need to arm police officers

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11. The Court in *Coupey* recognized an exception to this rule when there is "reasonable ground to the constable to believe a felony would probably ensue."

with greater powers because of "civil conditions in cities." *Hanser v. Bieber,* 271 Mo. 326, 197 S.W. 68, 70 (1917).

A similar terse analysis appears in the decision of the Illinois Supreme Court that upheld warrantless arrests for misdemeanors and ordinance violations on the same basis as felonies. In *People v. Edge,* 406 Ill. 490, 94 N.E.2d 359 (1950), the defendant has been arrested for "operating a motor vehicle without a safety-inspection sticker and obstructing an alley," in violation of two municipal ordinances. 406 Ill. at 498, 94 N.E.2d at 363. In rejecting the defendant's arguments that his arrest was unlawful, the Illinois Supreme Court held that because an ordinance violation punishable by fine is a "criminal offense," a person committing an ordinance violation such as operating a motor vehicle without a safety-inspection sticker is subject to arrest without warrant. 406 Ill. at 497, 94 N.E.2d at 363.

The equally cursory analysis appears in the decision of the Fourth Circuit in *Fisher v. Washington Metro. Area Transit Authority,* 690 F.2d 1133 (4th Cir. 1982). There, in upholding a full custodial arrest for eating on the subway, 690 F.2d at 1135, the Fourth Circuit held that a warrantless arrest for violation of a fine only ordinance is reasonable if based on probable cause because this Court has never held to the contrary. 690 F.2d at 1139 n.6. To the same effect is *Higbee v. City of San Diego,* 911 F.2d 377 (9th Cir. 1990), where the Ninth Circuit read *United States v. Watson,* 423 U.S. 411 (1976) as setting out the rule for arrest without warrant in misdemeanor and felony cases.[12] Id. at 379.

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12. *But see United States v. Philibert,* 947 F.2d 1467, 1469 (11th Cir. 1991), citing *Watson* for the proposition that "since these were petty offenses, not committed in the presence of the arresting officer, they were probably the subject of citation proceedings, and could not have formed a valid basis for issuance of an arrest warrant."

In this case, the Seventh Circuit upheld respondent's custodial arrest policy because it concluded that the "common law rule has been relaxed to include arrests for offenses other than breaches of the peace." (Pet.App. 6.) Although two of the three states that comprise the Seventh Circuit have sought to authorize full custodial arrests for fine-only ordinance violations,[13] most states continue to place strict limitations on an officer's power to make warrantless arrests for non-felonies.

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Although the distinction between misdemeanors and felonies has become less distinct,[14] the overwhelming majority of states continue to circumscribe an officer's power to make a warrantless arrest in non-felony cases.[15] These

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13. Illinois authorized full custodial arrests for ordinance violations in *People v. Edge, supra.* In Wisconsin, full custodial arrests for fine only violations are permitted only for offenses which are committed in the presence of the officer. *City of Milwaukee v. Nelson,* 149 Wis.2d 434, 457 439 N.W.2d 562, 571 (1989) Indiana adheres to a modified "in the presence of" limitation, Ind.Code.Ann. §35-33-1-1 and has long limited the power to make arrests in ordinance violation cases to situations necessary "to suppress riots and disorders in actual progress." *Pow v. Beckner,* 3 Ind. 474, 478 (1852).

14. See *Garner v. Tennessee,* 471 U.S. 1, 14 (1985) ("while in earlier times 'the gulf between the felonies and the minor offenses was broad and deep,' [citations omitted], today the distinction is minor and often arbitrary.")

15. One exhaustive study found only eight states that have sought to authorize warrantless arrests for misdemeanors on the same basis as for felonies. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment,* 58 Mo. L. Rev. 771, 783 n.18 (1993).

contemporary translations of the common law rule provide strong evidence that respondent's policy of using warrantless custodial arrests to initiate prosecutions for violations of its fine-only business ordinance is constitutionally unreasonable.

The most common limitation on an officer's power to make warrantless arrests for non-felonies is the requirement that the offense has been committed "in the presence" of the officer.[16] Of the original thirteen colonies, only New York has sought to authorize warrantless arrests for any offense, whether or not committed in the officer's presence, without regard to any indicia of "breach of the peace"[17]

Connecticut permits warrantless arrests for misdemeanors only when "the person arrested is taken or

16. Both the district court (Pet.App. 18) and the court of appeals (Pet.App. 6) concluded that petitioner had violated the license ordinance "in the presence" of the officers. Although this conclusion may be literally correct, the common law understanding of "in the presence of" required that the wrongdoing be readily apparent to the officers. *Pickett v. State,* 99 Ga. 12, 25 S.E. 608, 609 (1896); The officers must see something that is is "sufficiently indicative of a crime being in the course of commission," *People v. Moore,* 11 N.Y.2d 271, 272, 228 N.Y.S.2d 822, 823, 183 N.E.2d 225, 226 (1962); *United States v. Viale,* 312 F.2d 595, 600 (2d Cir. 1963). Respondent's ordinance (App. 15-16) does not require display of a business license; in this case, that petitioner did not have a business license did not become readily apparent until petitioner searched for, and could not locate, the license. (App. 65.)

17. N.Y. Crim. Pro. Law §140.10 (McKinney 1997) permits an officer to make warrantless arrest for any offense "whether in his presence or otherwise." The statute permits full custodial arrests for minor traffic infractions. *People v. Terrero,* 139 A.D.2d 830, 831, 537 N.Y.S.2d 135, 136 (1988)

apprehended in the act or on the speedy information of others."[18] The "speedy information" provision prohibits a warrantless arrest 11 hours after the alleged offense. *State v. Carroll,* 131 Conn, 224, 38 A.2d 798 (1944).

Delaware authorizes warrantless arrests for misdemeanors committed in the presence of the officer or in situations which are a modern equivalent of "breach of the peace." Under 11 Del.Code Ann. §1904 (1997), an arrest for a misdemeanor may be made without warrant for offenses committed out of the officer's presence involving "physical injury or the threat thereof. . . illegal sexual contact or attempted sexual contact. . . violation of a protective order issued by Family Court; or . . . misdemeanor occurring on school property."

Georgia likewise has narrowly defined the situations in which an officer may make a warrantless arrest for a misdemeanor not committed in his (or her) presence. Ga.Code.Annot. §17-4-20 (1997) permits warrantless arrests in cases involving "family violence," physical abuse of a vulnerable adult, "or for other cause if there is likely to be failure of justice for want of a judicial officer to issue a warrant."

In Maryland, warrantless arrests are only permitted for offenses committed in the officer's presence or view. Md.Ann.Code of 1957, Art. 27, §594B. Custodial arrests can be made for ordinance violations only when "the defendant has previously failed to respond to a summons for an offense other than a non-moving traffic offense; or there is a substantial likelihood that the defendant will not respond to a summons." *Schaefer v. State,* 31 Md.App. 437, 440, 356 A.2d

18. Conn. General Statute §54-1f(a)

617, 620 (1976).

With carefully enumerated exceptions for specific motor vehicle violations, Mass.Ann.Laws. ch. 90, §21, Massachusetts follows the common law rule, permitting a warrantless arrest for a non-felony only when an offense is committed in the presence of the officer and involves a breach of the peace. *Commonwealth v. Baez,* 42 Mass.App. 565, 678 N.E.2d 1335, 1338 (1997) Under this standard, an officer may not make an arrest for driving with a defective headlight. *Id.* Nor may an officer make a warrantless arrest for unlawful possession of an undersized lobster. *Commonwealth v. Wright,* 158 Mass. 149, 33 N. E. 82 (1893).

New Hampshire also enforces the "in the presence of" rule, but has created two exceptions: one for cases involving domestic violence and stalking, the other when the officer "has probable cause to believe that the person to be arrested has committed a misdemeanor or violation, and, if not immediately arrested, such person will not be apprehended, will destroy or conceal evidence of the offense, or will cause further personal injury or damage to property. N.H. Rev. Stat. Ann. §594:10 (1996)

New Jersey permits warrantless arrests for misdemeanors when three conditions are met: "(1) that the offenses must have occurred 'upon view' of the arresting officer and (2) that the offender was a disorderly person or (3) was committing a breach of the peace." *State v. Vonderfecht,* 284 N.J.Super. 555, 557, 665 A.2d 1145, 1146 (1995). As construed by the New Jersey Supreme Court, the statute does not permit a warrantless arrest for littering. *State v. Hurtado,* 113 N.J. 1, 549 A.2d 428 (1988), *reversing on dissent in* 291 N.J.Super. 12, 23, 529 A.2d 1000, 1006 (1987).

North Carolina also retains the "in the presence of" requirement, with two statutory exceptions: when the offender "[w]ill not be apprehended unless immediately

arrested, or may cause physical injury to himself or others, or damage to property unless immediately arrested." N.C. Gen. Stat. §15A-401 (1997).

Pennsylvania "has restricted the authority of police officers to make warrantless arrests for crimes not committed in their presence to a relatively narrow band of offenses. . . police officers [in Pennsylvania] seem to possess an extremely broad authority to arrest for some offenses that are committed in their presence, even when these offenses are of only the the most trivial sort, often not even crimes. McCarthy, *Warrantless Arrests in Pennslyvania,* 92 Dick.L.Rev. 115, 130 (1987).

Rhode Island has abandoned the "in the presence of" requirement, *State v. Berker,* 120 R.I. 849, 855, 391 A.2d 107, 111 (1978) but permits warrantless misdemeanor arrests only when the officer "has reasonable ground to believe that person cannot be arrested later or may cause injury to himself or herself or others or loss or damage to property unless immediately arrested." R.I.Gen. Laws §12-7-3 (1996).

South Carolina authorizes warrantless arrests for offenses committed "in view," provided that the arrest is "made at the time of such violation of law or immediately thereafter." S.C. Code Ann. §17-13-30 (1997).

Virginia adheres to the "in the presence" of requirement for warrantless misdemeanor arrests. Va. Code Ann. 19.2-81 (1997. This requirement also appears in 41 federal statutes.[19]

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19. The statutes include 8 U.S.C. §1357, 16 U.S.C §3375, 16 U.S.C. §1172, 16 U.S.C. §1338, 16 U.S.C. §1377, 16 U.S.C. §1540, 16 U.S.C. §1861, 16 U.S.C. §1a-6, 16 U.S.C. §5506, 16 U.S.C. §559c , 16 U.S.C. §668(b), 16 U.S.C. §670j , 16 U.S.C. §690e, 16 U.S.C. §706, 16 U.S.C. §727, 16 U.S.C. §742j-1, 16 U.S.C. §831c-3, 16 U.S.C. §916(g), 16 U.S.C. §959, 16 U.S.C. §971f, 16 U.S.C. §972g , 18 U.S.C. §3052 18 U.S.C. §3056 , 18 U.S.C. §3061, 18 U.S.C. §3063 , 19 U.S.C. §1589a, 21

Many of the states without the common law history of the original colonies have adopted different variations on the the common law limitations on an officer's right to make arrests without warrant in non-felony cases. Hawaii does not permit warrantless arrests for a motor vehicle violation that is not a misdemeanor. *State v. Vallesteros*, 933 P.2d 632 (1997). Alaska permits an officer to make a warrantless arrest for a non-felony only when "personal or property damage is likely to be done unless the person is immediately arrested," and "there is no known judicial officer empowered to issue a warrant within a radius of 25 miles of the person to be apprehended." Alaska Stat. §12.25.035.

New Mexico adheres to an "in the presence of" requirement for warrantless misdemeanor arrests, *State v. Tywayne H.*, 123 N.M. 42, 933 P.2d 251, 257 (1997) and requires that "once an officer has the right to arrest without a warrant for a misdemeanor or breach of the peace committed in his presence he must do so as soon as he reasonably can, and if he delays for purposes disassociated with the arrest or for such a length of time as to necessarily indicate the interposition of other purposes, he cannot arrest without a warrant." *State v. Calanche*, 91 N.M. 390, 393, 574 P.2d 1018, 1021 (1958).

Arizona authorizes warrantless arrests for misdemeanors on probable cause, but also requires the arresting officer to issue a complaint and notice in misdemeanor and petty offense cases. 5A Ariz. Rev. Stat. § 13-3884, §13-3903;

U.S.C. §372, 21 U.S.C. §878, 22 U.S.C. §1978, 22 U.S.C. §2709, 25 U.S.C. §2803, 26 U.S.C. §7608, 28 U.S.C. §566, 33 U.S.C. §452, 33 U.S.C. §466, 40 U.S.C. §212a , 40 U.S.C. §212a-2, 42 U.S.C. §2456a, 42 U.S.C. §7270a, 43 U.S.C. §1733, and 49 U.S.C. §44903.

State v. Taylor, 167 Ariz. 439, 808 P.2d 324 (1991)

Oklahoma adheres to a strict "in the presence of" requirement for misdemeanor cases, with statutory exceptions for domestic abuse and driving while intoxicated. 22 Okl.St. §196; *Tomlin v. State*, 869 P.2d 334, 338 (1994).

Utah also adheres to the "in the presence of" requirement, *Salt Lake City v. Hanson*, 19 Utah 2d 32, 34, 425 P.2d 773, 774 (1967), with exceptions for carefully delineated emergency situations.[20]

Wyoming law is similar to that applied in Utah, requiring that the offense has been committed "in the presence of" the arresting officer or that there be a predefined emergency situation, using the same list as in Utah. Wyo.Stat. §7-2-102 (Supp. 1994); Wyo.Stat. §31-5-1204(a); *Nellis v. Wyoming Department of Transportation*, 932 P.2d 741, 744 (Wyoming 1997).

Idaho law also enforces the "in the presence of" requirement for warrantless misdemeanor arrests. *State v. Bowman*, 124 Idaho 936, 940, 866 P.2d 193, 197 (1994); Idaho Code § 19-603.

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20. Utah Code Ann. §7707-2(3) provides for arrest without warrant when the officer:

> (3) . . . has reasonable cause to believe the person has committed a public offense, and there is reasonable cause for believing the person may:
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> (a) flee or conceal himself to avoid arrest;
>
> (b) destroy or conceal evidence of the commission of the offense; or
>
> (c) injure another person or damage property belonging to another person.

In South Dakota, "an arrest for a misdemeanor must be made upon a warrant, unless committed in the presence of the arresting officer." *State v. Spry,* 87 S.D. 318, 327, 207 N.W.2d 504, 509 (1973). The same rule applies in North Dakota. *State v. Ritter,* 472 N.W.2d 444, 447 (North Dakota 1996); N.D.C.C. §29-06-15

Montanta permits a warrantless arrest when an offense is being committed or when the officer has probable cause to believe that "the person has committed an offense and existing circumstances require immediate arrest." Mont. Code Anno. §46-6-311 (1997). In *State v. Jetty* 176 Mont. 519, 579 P.2d 1228 (1978), the Montana Supreme Court held that a person detained on a warrant for failure to pay an overdue $1.00 parking ticket could not be subjected to a full custodial search.

Colorado permits warrantless arrests, without the "in the presence of" requirement, for misdemeanors, *Garcia v. People,* 160 Colo. 220, 416 P.2d 373 (1966), but not for minor traffic infractions. *People v. Barrientos,* 1997 WL 703351 (Colo.App. 1997).

In Nebraska, "without an exigent circumstance, a police officer may not arrest an individual for a misdemeanor unless it is committed in the officer's presence." *State v. Marcotte,* 233 Neb. 533, 537, 446 N.W.2d 228, 232 (1989). The statute defines exigent circumstances as follows: "(a) will not be apprehended unless immediately arrested; (b) may cause injury to himself or others or damage to property unless immediately arrested; (c) may destroy or conceal evidence of the commission of such misdemeanor; or (d) has committed a misdemeanor in the presence of the the officer." Neb.Rev.Stat. §29-404.02 (1997).

Nevada permits a warrantless arrest for any "public offense" committed in the officer's presence, and has relaxed

the "in the presence of" requirement for "a felony or gross misdemeanor."[21] Nev.Rev.Stat. §171.124 (1997).

West Virginia adheres to the "in the presence of" standard. *Simon v. West Virginia Department of Motor Vehicles,* 181 W.Va. 267, 268, 383 S.E.2d 320, 321 (1989); W.Va. Code §62-10-9 (1997).

Kansas expanded the "in the presence of" requirement in 1970, when it authorized warrantless misdemeanor arrests "in certain emergency situations." *State v. Flummerfelt,* 235 Kan. 609, 612, 684 P.2d 363, 366 (1984); Kan.Stat.Ann. 22-2401 (1997).

At least 42 states continue to recognize some aspect of the common law limitation on warrantless arrests in non-felony cases. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment,* 58 Mo. L. Rev. 771, 783 n.18 (1993). The continued vitality of the common law limitations on warrantless arrests in non-felony cases supports the rule advanced by petitioner — that a warrantless arrest for violation of a fine-only ordinance not involving any breach of the peace is unreasonable under the Fourth Amendment.

-D-

In the district court, respondent sought to justify its mandatory arrest policy because its officers do not carry ordinance citation forms. When asked by respondent's counsel to explain the reason for the municipal policy, Commander

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21. Under Nevada law, a misdemeanor is punishable by imprisonment of not more than six months, or a fine of not more than one thousand dollars. Nev.Rev.Stat. §193.150. The penalties for a "gross misdemeanor" are imprisonment of up to one year or a fine of not more than two thousand dollars. Nev.Rev.Stat. §193.140.

Fellmann answered as follows (App. 31):

> Q. With regard to the local ordinance violation policy of the Village of Arlington Heights with regard to a business that does not have a Village of Arlington Heights business license, can you state why those persons are arrested?
>
> A. For violation of that village ordinance.
>
> Q. Why aren't they just issued a ticket, do you know?
>
> A. We have no instrument designed for citing them in the field. I mean, the manner in which our department is structured is that the complaint is prepared on a document at our station and bond is required if this is a bondable offense.

It would not be difficult for respondent to create an ticket book to issue field citations. Such an innovation would be neither new nor novel.[22] Instead, a ticket book for violations of the business license ordinance could be the same ticket book used by respondent's police officers to issue

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22. For example, Calif. Penal Code §853.5 (1997) provides as follows

> In all cases . . . in which a person is arrested for an infraction, a peace officer shall only require the arrestee to present his driver's license or other satisfactory evidence of his identity for examination and to sign a written promise to appear. Only if the arrestee refuses to present such identification or refuses to sign such a written promise may the arrestee be taken into custody.

The Ninth Circuit relied on this "expression of disinterest in allowing warrantless arrests for mere infractions" to hold "that a custodial arrest for such an infraction is unreasonable, and thus unlawful, under the Fourth Amendment." *United States v. Mota,* 982 F.2d 1384, 1389 (9th Cir. 1993).

parking tickets.

Respondent's policy of requiring the warrantless arrest of persons suspected of operating a business without a license cannot be justified by any need for emergency action when, as here, the alleged offender operates his business from a fixed address and the officers knew for at least two days before making the arrest that petitioner had not been issued a license. (App. 49.)

Nor can respondent's policy be sustained because it is necessary "to prevent [petitioner] from committing a misdemeanor which would have been a breach of the peace had the attempt been translated into action." Stone, *Arrest Without Warrant,* 1939 Wis.L.Rev 385 (1939). There is no suggestion in the record that operating an otherwise lawful business threatened the public peace.

Finally, respondent's municipal policy cannot be defended as necessary to initiate the prosecution for an ordinance violation. Persons charged with the fine only ordinance are neither fingerprinted nor photographed. (App. 38.) The only paperwork required to initiate a prosecution for an ordinance violation is a complaint which need be no different than a parking ticket.

In addition to the administrative convenience rationale it advanced in the district court, respondent may seek to uphold its municipal policy on the ground articulated by the Seventh Circuit and argue that a custodial arrest is necessary "in order to ensure compliance with the ordinance." (Pet.App. 7.) This theory was embraced by the Ohio Supreme Court in *White v. Kent,* 11 Ohio St. 550 (Ohio 1860) when it upheld a local ordinance that prohibited auction sales on the public way:

> It is evident that many ordinances necessary for good order and general convenience, as well as for the preservation of morals and decency, would be almost nugatory, if offenders could only be arrested upon

warrant. Such is clearly not the policy of the statute. 11 Ohio St. at 553.

Other jurisdictions rejected this rationale long ago, because "it is to all intents and purposes a separate and independent punishment for the offenses specified," *Judson v. Reardon,* 16 Minn. 431, 434 (1871) and because vesting officers with such power is "liable to great abuses." *Pow v. Beckner,* 3 Ind. 474, 478 (1852). The record in this case leaves no doubt about the potential for abuse — Officer Lehnert revealed that the officers were enforcing the business license ordinance "based on numerous complaints that our department had received in conjunction with [petitioner's] business." (App. 55.) Although none of the complaints provided a lawful basis for interfering with petitioner's business, the officers were able to summarily punish petitioner by exploiting respondent's full custodial arrest policy.

The central purpose of the Fourth Amendment was to curb the discretion vested by "general warrants: that placed "the liberty of every man in the hands of every petty officer." *Boyd v. United States,* 116 U.S 616, 625 (1886), quoting the remarks of James Otis. This is precisely the result of the rule adopted by the Seventh Circuit in this case.

Requiring full custodial arrests to compel compliance with a fine only ordinance imposes significant costs on the person arrested. An arrest — even one "to ensure compliance" — "is abrupt, is effected with force or threat of it, and often in demeaning circumstances." *United States v. Dionisio,* 410 U.S. 1, 10 (1973). "An arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends." *United States v. Marion,* 404 U.S. 307, 320 (1971).

In this case, respondent exploited the trauma of arrest "to stop the telemarketing firm from causing the kind of complaints you had received about them." (App. 25.) The police adopted this goal because petitioner's firm "was negatively reflecting upon the image of the department." *Id.* These totalitarian tactics undercut the role of the Fourth Amendment of preserving "one of the most fundamental distinctions between our form of government, where officers act under the law, and the police state where they are the law." *Johnson v. United States,* 333 U.S. 10, 17 (1948).

Respondent's use of its mandatory arrest policy because petitioner's firm "was negatively reflecting upon the image of the [police] department," (App. 25), exemplifies the "arbitrary and discriminatory enforcement" that underlies the decision of the Florida Supreme Court to prohibit full custodial arrests for violation of a municipal ordinance requiring that all bicycles be equipped with gongs. *Thomas v. State,* 614 So.2d 468, 470-71 (Fla. 1993).

The lack of any legitimate justification for respondent's mandatory arrest policy is made plain by a comparison with the efficient citation procedure employed in California. There, "[w]hen an adult is arrested for an infraction (with the exception of a few specified Veh.Code violations), the arresting officer requires that the person present a driver's license or other satisfactory evidence of identification and sign a promise to appear. Only if the person refuses to present identification or to sign the promise to appear can he or she be taken into custody." *In re Rottanak K.,* 37 Cal.App.4th 260, 276, 43 Cal.Rptr.2d 543, 552 (1995). "[W]hen an adult is arrested for a misdemeanor and does not demand to be taken before a magistrate, he or she must be released once the arresting officer has prepared a written notice to appear in court and the arrestee has given a written promise to appear as specified in the notice, unless the officer makes special findings." *Id.*

There is no legitimate basis to vest policy officers with the authority to make full custodial arrests "in order to ensure compliance with the ordinance." This unregulated power makes the arresting officer the prosecutor and judge in a summary prosecution for an alleged violation of a fine-only ordinance. As this Court observed in *Wong Sun v. United States*, 371 U.S. 471 (1963), "[t]he history of the use, and not infrequent abuse, of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would 'leave law-abiding citizens at the mercy of the officers' whim or caprice,'" quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949). Those who framed the Fourth Amendment would be appalled that a federal court had endorsed warrantless seizures "to ensure compliance" with an ordinance punishable by fine only.

-III-

The appropriate translation of the common law limitations on warrantless arrests in non-felony cases to fine-only infractions is that a custodial arrest is constitutionally unreasonable unless there is an actual or threatened breach of the peace: the Fourth Amendment should not be warped to permit arrests "to ensure compliance" with a fine-only ordinance.

The Seventh Circuit expressed the view that petitioner had been lawfully arrested because "a neutral magistrate following Illinois law would surely have issued a warrant in the case." (Pet.App. 8 n.1.) This view greviously misconceives the warrant clause: "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity

and leave the people's homes secure only in the discretion of police officers."[23] *Johnson v. United States*, 333 U.S. 10, 14 (1947).

The framers "after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance." *United States v. DiRe*, 332 U.S. 581, 595 (1948). Respondent's mandatory arrest policy resurrects the roving commission of the general warrants that were vilified by the framers and cannot stand.

CONCLUSION

It is therefore respectfully submitted that the decision of the Court of Appeals should be reversed and the case remanded to the district court.

February, 1998

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23. Because respondent's policy did not include any involvement by a judicial officer, this case does not present any question about whether a judge, consistent with the Fourth Amendment, could issue an arrest warrant for violation of a fine-only ordinance. *Cf. Pulliam v. Allen*, 466 U.S. 522 (1984) (upholding fee award against local magistrate after injunction to end magistrate's practice of incarcerating persons unable to post bail on fine-only offenses).

(6)

No. 97-501

In The

Supreme Court of the United States

October Term, 1997

RANDALL RICCI,

Petitioner,

v.

VILLAGE OF ARLINGTON HEIGHTS,
A MUNICIPAL CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTION PRESENTED

Whether an arrest that is supported by probable cause is per se unreasonable under the Fourth Amendment solely because the underlying offense is punishable by a fine and not by incarceration.

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STATEMENT

1. An ordinance adopted by the Village of Arlington Heights, Illinois, makes it "unlawful for any person to conduct, engage in, maintain, operate, carry on or manage a business" within the Village "without first having obtained a license for such business" (Section 9-201; see J.A. 16).[1] A violation of the ordinance was, at the time of the events in this case, punishable by a fine of up to $500.00 for "each day during or on which a violation occurs or continues" (J.A. 16).

On April 19, 1994, two Arlington Heights police officers executed an arrest warrant at the business premises of a telemarketing firm named Rudeway Enterprises. The warrant named one Daniel Dugo, who was employed by Rudeway Enterprises. Pet. App. 12; J.A. 49, 61-62. The Arlington Heights Police Department had previously received complaints that Rudeway Enterprises used "high pressure" telemarketing tactics and represented itself as authorized to solicit on behalf of the Arlington Heights Police Department. J.A. 20, 18-19. Before executing the warrant at the premises of Rudeway Enterprises, the Arlington Heights officers had determined that no business license had been issued for that firm. See J.A. 22, 37.

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[1] Section 9-201 applies to any business "for which a license is required." Section 14-3001, at the time of petitioner's arrest, required a license for "[t]he places of business hereinafter enumerated in Section 14-3002" (J.A. 15); Section 14-3002 listed a number of businesses specifically and then "[a]ny and all business enterprises not named elsewhere in this Code." J.A. 16. Petitioner argued below that he was not required to have a license, but the district court rejected that argument (Pet. App. 15) and petitioner has not challenged that ruling.

After arresting Dugo pursuant to the warrant, the officers interviewed petitioner, who owns Rudeway Enterprises and who was on the premises at the time. Pet. App. 2. Petitioner told the officers that Rudeway was a telephone solicitation business. J.A. 64.[2] When petitioner was unable to produce an appropriate license, the officers told him that he was in violation of the Village ordinance and that he would be issued a citation at police headquarters. J.A. 65. Officer Whowell, who had primary responsibility for the case, explained his exchange with petitioner as follows (J.A. 65-66):

> I told him that based on the village ordinance requirement I requested that he accompany me to the Arlington Heights Police Department and I explained to him the procedure [t]hat was going to take place, that fact that he would be issued a citation.
>
> * * *
>
> I indicated to him that [] specifically that he would be issued a citation for not having a village license. I indicated to him that we would need to go to the police department to do that. I asked him if he was in a position to accompany me there, and he indicated that he was. And that's when he was escorted back to the police department.

The officer subsequently explained that he took petitioner to the police station because "our department policy does not allow us to take any type of monetary bond or to issue a recognizance bond on the street. That has to be

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[2] It is not clear from the record how many employees Rudeway had at the time of petitioner's arrest. Six months earlier the firm had 20 employees. Ricci Dep. 11. ("Ricci Dep." refers to petitioner's deposition.)

done at the police department." J.A. 66. Petitioner was not handcuffed. J.A. 66; Ricci Dep. 32.

At the station, the arresting officers completed an arrest report, a citation, and a bond receipt. J.A. 69. Petitioner was photographed, but he was not fingerprinted. J.A. 38. The arresting officer asked the Sergeant on Duty to release petitioner on a recognizance bond, and the Sergeant agreed to do so. J.A. 73. While this process was being completed, petitioner remained in an interview room. J.A. 68. After the officers completed the necessary forms, petitioner was released on a recognizance bond. He was detained for a total of approximately one hour. J.A. 41-42; Pet. App. 12.

After his arrest, petitioner's wife obtained a Village license for the firm. Pet. App. 12. Because he had a valid license at the time of his appearance in court, the charges against him were dismissed. Pet. App. 12.

2. Petitioner then brought this action under 42 U.S.C. 1983 in the United States District Court for the Northern District of Illinois, seeking damages from both the Village and the officers. Petitioner alleged that his arrest violated the Fourth Amendment; that the arrest was made pursuant to a Village policy that violated the Fourth Amendment; and that Officer Whowell had conducted an unlawful search. The district court denied the defendants' motion for summary judgment on the count pertaining to the allegedly unlawful search, but noted that "[t]he only evidence" of an unlawful search was petitioner's claim, denied by Officer Whowell, that the officer "pick[ed] up and inspect[ed] a 3x5 index card off a desk" (Pet. App. 13). The district court ruled that petitioner had shown no compensable injury in connection with the search (*id.* at 14).

The district court granted summary judgment to all defendants on all issues related to petitioner's arrest. Pet. App. 15-19. The court specifically rejected petitioner's claim that his arrest violated the Fourth Amendment. The court ruled that Arlington Heights ordinances forbade petitioner to operate a telemarketing business without a license, and noted that "[t]he officers observed [petitioner] committing this unlawful act." Pet. App. 15-16. Accordingly, the district court held, the officers had probable cause to arrest petitioner. Pet. App. 16.

The district court then rejected petitioner's argument that the Village violated the Fourth Amendment by adopting a policy requiring what petitioner termed "full custodial arrests" for violations of the business license ordinance. Pet. App. 16. The district court noted that the Fourth and Ninth Circuits had both rejected arguments that the Fourth Amendment prohibits law enforcement officers, acting with probable cause, from arresting a person who has committed a misdemeanor. Pet. App. 16-17. The district court also ruled that even if the Fourth Amendment's requirement of reasonableness "incorporate[d] * * * the common law rule requiring an officer to witness a misdemeanor before arresting someone for it," the arrest of petitioner would still have been lawful because petitioner "committed his offense * * * in the presence of [the o]fficers" (Pet. App. 18).

The claim pertaining to the unlawful search was subsequently settled, and that count of the complaint was dismissed. Pet. App. 3; J.A. 2. Petitioner did not appeal the grant of summary judgment in favor of the officers. Pet. App. 3.

3. The court of appeals affirmed the grant of summary judgment in favor of the Village. Pet. App. 1-9. The

court of appeals first noted that, as the district court had said, petitioner's arrest "comports with the common law rule" because petitioner had "committed the offense in the officers' presence." Pet. App. 6. The court rejected petitioner's argument that the Village also had to show that the offense constituted a breach of the peace, noting that "the common law rule has been relaxed to include offenses other than breaches of the peace." Pet. App. 6.

The court then reviewed the circumstances of petitioner's arrest and held that the officers' conduct was reasonable. Pet. App. 7. The court explained that, because fines under the Village's ordinance accrue daily, "[b]y the time he was arrested, [petitioner] was facing a potential fine of tens of thousands of dollars." Pet. App. 7.[3] In addition, the court explained, petitioner "admitted to the officers that he was currently violating the [ordinance,]" and "[t]he officers held him for only one hour, the length of time it took to process the paperwork associated with the arrest." Pet. App. 7. The court concluded that "[w]e cannot call such an arrest unreasonable for Fourth Amendment purposes." Pet. App. 7.

The court of appeals "decline[d] to set a per se rule" that the Fourth Amendment bars all arrests for "offense[s] punishable by fine only, where the offense does not constitute a breach of the peace." Pet. App. 7, 5. The court of appeals noted that the reasonableness requirement of the Fourth Amendment ordinarily requires an assessment of the particular facts of each case, and that when the police have probable cause to arrest a

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[3] According to petitioner's deposition, his firm had been operating in Arlington Heights since October 1993. Ricci Dep. 10.

suspect, the arrest is reasonable in the absence of "extraordinary" circumstances. Pet. App. 7-8. The court specifically refused to consider petitioner's argument that the arrest violated the Warrant Clause of the Fourth Amendment, holding that petitioner had "waived this argument by not addressing it in his brief." Pet. App. 8.

SUMMARY OF ARGUMENT

A. Petitioner's arrest was based on probable cause. It was carried out in a reasonable manner, and it was not excessive in duration. The Fourth Amendment requires no more than that. This Court has never invalidated an arrest, based on probable cause, in these circumstances.

B. A per se rule restricting arrests for "minor" offenses would be unworkable, and is in any event unnecessary.

1. The rule petitioner advocates would force officers, acting with probable cause, either to release suspects with a citation – thus increasing the chances that they will abscond – or to assess and collect a bond on the scene of the arrest, something that officers in the field are ill-equipped to do. Among other things, individuals arrested for minor crimes can have records that include far more serious offenses, and officers in the field will not routinely have access to that information.

In addition, an arrest is often needed to maintain control of a dangerous situation, which can develop whenever the police encounter a suspect on the street – even if the charge against the suspect is for a relatively minor crime.

2. The profusion and variety of state laws governing arrests for misdemeanors and fine-only offenses shows that this Court's intervention is not needed. States

have addressed this issue in ways that suit their particular circumstances. Moreover, the complexity of many state schemes is the best evidence that a simple per se rule, applied nationwide as a matter of constitutional law, is not appropriate. In addition, police officers have no incentive to create additional paperwork for themselves by arresting people unnecessarily for minor offenses. The possibility that arrests will be made pretextually or for purposes of harassment is poorly addressed by an across-the-board rule of the kind petitioner advocates.

3. Petitioner's implicit denigration of the importance of enforcing laws against "minor" offenses flies in the face of both social science and the realities of law enforcement, especially in urban areas. The effective enforcement of misdemeanors and fine-only offenses – something that cannot be accomplished if the police are limited to handing out frequently-ignored citations – is one of the most powerful tools in maintaining stable and safe urban communities.

C. The common law background of the law of arrest does not support petitioner's claim. It has always been understood, both in England and in this country, that the common law of arrest can be modified by statute. In any event, the traditional limits on arrests for misdemeanors have survived in this country only to the extent that they require the offense to have occurred in the presence of the arresting officer. Petitioner's offense did occur in the presence of the officers who arrested him.

ARGUMENT

AN ARREST SUPPORTED BY PROBABLE CAUSE DOES NOT VIOLATE THE FOURTH AMENDMENT MERELY BECAUSE THE UNDERLYING OFFENSE IS PUNISHABLE ONLY BY A FINE.

A. An Arrest That Is Based On Probable Cause And Is Reasonable In Manner And Duration Satisfies The Fourth Amendment.

1. In more than 200 years, this Court has never invalidated an arrest that was based on probable cause. See *United States v. Watson*, 423 U.S. 411, 417-18 (1976), quoting *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975). "A police officer may arrest a person if he has probable cause to believe that person committed a crime." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). When officers enter a dwelling in order to effect an arrest, the Court has held that a warrant, as well as probable cause, is ordinarily needed. See *Payton v. New York*, 445 U.S. 573 (1980); *Welsh v. Wisconsin*, 466 U.S. 740 (1984). But the warrant is required because of "the breach of the entrance to an individual's home" (*Payton*, 445 U.S. at 589) – not because of the arrest. When police officers are in a place where they have a right to be, the Court has never required more than probable cause to sustain an arrest.

In such circumstances, "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Gerstein*, 420 U.S. at 113-14. That, of course, describes exactly what the Arlington Heights officers did in this case. "Where probable cause has existed," the Fourth Amendment is offended only by "seizures

conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests." *Whren v. United States*, 116 S.Ct. 1769, 1776 (1996).

2. The courts below determined that the police officers' conduct in this case – far from being "extraordinary" or "unusually harmful" to petitioner's legitimate interests – was fully reasonable. Pet. App. 7, 16-17. The officers who arrested petitioner had probable cause to believe him guilty of an offense. Indeed they were, for all practical purposes, certain of his guilt, on the basis both of evidence they themselves had seen and of petitioner's admissions. Petitioner was facing a substantial fine. An individual on his business premises, whom petitioner employed, had just been arrested on a valid arrest warrant.[4]

The officers never handcuffed petitioner. There is no indication in the record that he was either patted down or searched, or that the business premises were searched incident to arrest.[5] Petitioner's account of his arrest is as follows (Ricci Dep. 31):

> [The officer] told me that he didn't think I had [a license] and that they were going to bring me down to the station to see if I had one and if I didn't have one they weren't arresting me, they were going to help me take the measures to get one.

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[4] Petitioner does not dispute the lawfulness of the officers' entry of his business property, which was based on the arrest warrant. See *Payton*, 445 U.S. at 602-03.

[5] Petitioner asserted, and the officers denied, that one of the officers looked at a single index card. Pet. App. 13. Petitioner did not assert that the officers searched his person or his business premises in any other way.

Petitioner stated that the officers never told him he was under arrest (Ricci Dep. 38), and petitioner, according to his own testimony, did not realize he was under compulsion to go to the station (Ricci Dep. 32). Indeed petitioner testified that he did not realize he was under arrest until shortly before he was released (Ricci Dep. 38). The officers detained petitioner for approximately one hour, the amount of time needed to complete the necessary paperwork. Nothing in this series of events remotely exceeds the bounds of ordinary, prudent police work, and both lower courts so held.

Petitioner repeatedly characterizes the officers' actions as a "full custodial arrest" (*e.g.*, Pet. Br. 3, 4, 5, 24, 26) and urges that the Fourth Amendment forbids such an arrest in the circumstances presented here. But it is unclear what petitioner means by the term "full custodial arrest" and which aspect of the officers' conduct petitioner finds unreasonable within the meaning of the Fourth Amendment. Petitioner was not place in a jail or a holding cell. He was not subjected to an inventory search of the kind that is permitted when suspects are incarcerated. See *Illinois v. Lafayette*, 462 U.S. 640 (1983). He was not fingerprinted. J.A. 38. He was held in an interview room of the sort that is used by Arlington Heights police for members of the public who are not accused of crimes – such as witnesses and victims – while they wait at the station. See J.A. 32. Indeed, in his deposition, petitioner described the room in which he was held as "some kind of waiting room or something" (Ricci Dep. 33). In no other respect was he subject to physical restraint. Petitioner was released as soon as the needed paperwork was completed.

It appears that petitioner's objection is that the officers should not have transported him to the station but should instead have issued him a citation at his place of business. See Pet. Br. 25; see also ACLU Am. Br. 10 ("The police did not do anything at the stationhouse that they could not have done at petitioner's place of business."). But the Fourth Amendment surely does not require officers to process paperwork and issue a bond on the scene of an arrest, in surroundings that are unfamiliar and unpredictable. This is especially true when the Village has a consistent policy of bringing arrestees to the station, a policy based on the obviously legitimate interest in having bond applications processed – and a cash bond collected, if one is required – only by a supervisory officer at the station, rather than by officers in the field. Nor – as we explain later – can the Fourth Amendment possibly be interpreted to require police officers who have apprehended an offender on probable cause automatically to release him with no bond or security that he will appear, merely because the offense is not punishable by incarceration. See pages 32-36 below.

Even in the context of a so-called *Terry* stop – a seizure not based on probable cause (see *Terry v. Ohio*, 392 U.S. 1 (1968)) – the Court has refused to adopt a rule requiring the police to use the least restrictive means of accomplishing their objective. See *United States v. Sharpe*, 470 U.S. 675, 687 (1985). " '[T]he fact that the protection of the public might, in the abstract, have been accomplished by "less intrusive" means does not, in itself, render the [seizure] unreasonable.' " *Ibid.*, quoting *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973). For Fourth Amendment purposes, the only question is whether the officers' conduct was "diligent and reasonable" (*Sharpe*, 470 U.S. at

687) – a standard that the officers here clearly met. If a "least restrictive means" standard is inappropriate when officers are seizing a person without probable cause, then *a fortiori* there is no basis for such a rule when the officers have probable cause. In any event, even if such a rule were to apply, petitioner cannot explain why any action taken by the Arlington Heights officers was gratuitous.

3. Petitioner nonetheless asserts that the Fourth Amendment requires a per se rule forbidding actions like those taken by the officers in this case. But as petitioner and his supporting amici themselves demonstrate, and as we discuss more fully below (see pages 25-29), states have adopted a variety of different limitations on the power to arrest for misdemeanors and fine-only offenses; some states have allowed more flexibility to officers than others. There is no reason to homogenize all of these varied solutions into a single federal constitutional rule.

Indeed, petitioner and his supporting amici disagree among themselves about what the per se rule should be. Petitioner at one point calls for a rule "prohibiting warrantless arrests in misdemeanor cases that do not involve a breach of the peace[.]"[6] The court of appeals, however, held that petitioner waived the argument that the lack of a warrant was the fatal defect in his arrest (Pet. App. 8), and petitioner does not at any point in his petition or merits brief attempt to explain why that ruling was mistaken.[7] So petitioner's position must be taken be that "a

[6] This quotation is taken from the first question presented in petitioner's brief. That page is not numbered.

[7] Although petitioner's court of appeals brief twice uses the adjective "warrantless" to describe his arrest, petitioner makes no substantive argument for the proposition that a warrant should be required in cases of this kind.

full custodial arrest for a fine-only ordinance violation not involving a breach of the peace is contrary to the Fourth Amendment" (Pet. Br. 4) – which is how petitioner himself characterizes the position he asserted in the courts below.

One amicus, however, would permit arrests in a wider variety of circumstances, calling for a rule forbidding "full custody arrests for violations of fine-only ordinances not involving a breach of the peace *or a threat to public health or safety*" (NACDL Am. Br. 3; emphasis added)[8] – an elastic category that, according to the amicus itself, includes " 'quality of life' laws" (*id.* at 14) and that could plausibly be interpreted to cover the ordinance at issue here, a licensing law designed to ensure the safety of business premises and to prevent fraud and abuse. Another amicus would forbid arrest "for fine-only offenses in the absence of exigent circumstances" (ACLU Am. Br. 3) – a category that the amicus vaguely defines as "potential harm, defiance of legal process, *e.g.*" (*id.* at 27).

The differences among the proposed rules, and their vagueness, reveal the futility of trying to use a bright-line Fourth Amendment rule in this area: arrests for misdemeanors and fine-only offenses present a very wide variety of circumstances, and any single nationwide constitutional rule will be ill-adapted to the issue. "[T]he 'touchstone of the Fourth Amendment is reasonableness' " and "[i]n applying this test [the Court] ha[s] consistently eschewed bright-line rules." *Ohio v.*

[8] "NACDL Am. Br." refers to the amicus curiae brief of the National Association of Criminal Defense Lawyers.

Robinette, 117 S.Ct. 417, 421 (1996), quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). In defining the limits on police officers' power in this area, state and local governments should be permitted to pursue different approaches, allowing their officers the degree of flexibility that is appropriate to particular local conditions.

The per se rules proposed by petitioner and his supporting amici have two things in common: they purport to be validated by the common law; and they would make it substantially more difficult for police officers to arrest individuals for "minor" crimes, defined as either misdemeanors or fine-only offenses. In fact, petitioner's arguments – which find no support in this Court's decisions and have been consistently rejected by the lower courts – misunderstand both the nature of the common law rule and the relationship between the common law and the Fourth Amendment, as we demonstrate in Part C. Perhaps more important, petitioner's argument, with its implicit denigration of the need for effective enforcement of laws against so-called "minor" offenses, reflects a deep and potentially very harmful misconception of the nature of law enforcement, particularly in modern urban settings.

B. A Per Se Constitutional Limit On The Power To Arrest For "Minor" Offenses Would Seriously Undermine Important Law Enforcement Objectives.

The approach that petitioner suggests – imposing additional requirements, besides probable cause, for arrests for "minor" offenses – is not only unfounded in the Fourth Amendment; it is both impractical and unnecessary. Arrests, even for supposedly minor offenses, serve multiple important purposes. Those purposes cannot be

accommodated by exceptions for "exigent circumstances," "breaches of the peace," "quality of life offenses," "defiance of process" and the like, unless, of course, those exceptions are construed so flexibly as to render the rule meaningless.

In addition, a per se rule limiting the power to arrest for minor offenses in unnecessary. States have shown themselves willing to impose restrictions on the power of law enforcement officers to make arrests for misdemeanors and fine-only offenses, and they have imposed a variety of such restrictions that respond to local conditions. There is also a built-in check on police officers in such situations. Arrests consume far more time and resources that issuing citations, or simply warning offenders. Officers have no interest in spending those resources unnecessarily, and as a general rule will choose the less intrusive route when it is appropriate. Pretextual or harassing police conduct is, of course, an important concern, when it occurs. But a blanket prohibition on an entire category of arrests is an ill-conceived way of dealing with that concern.

Most important, however, petitioner's approach rests on the premise that the enforcement of laws against misdemeanors, or offenses punishable by fines, is a matter of relatively low social importance. This premise flies in the face of both a substantial body of social science and the gritty realities of police work.

1. Stationhouse arrests for "minor" offenses serve important law enforcement purposes.

a. Historically a central purpose of an arrest has been to ensure the suspect's presence at trial. See, *e.g.*, 4 William Blackstone, *Commentaries on the Laws of England*

*286. Generally, of course, suspects, especially those accused of misdemeanors, are detained only until bond is set and provided. That is what happened in this case: the officers brought petitioner to the station so that the bond determination could be made by a supervisory officer.

Petitioner's approach, however, would force law enforcement agencies to choose between two unattractive alternatives in dealing with suspected misdemeanants. Either officers would issue a summons to the suspect without collecting any bond, or they would set and collect a cash bond on the scene. The first course – issuing a citation and allowing the suspect to go on his way – would, inevitably, greatly increase the numbers of suspects who do not appear for trial and escape punishment entirely. The second course – authorizing the officers collect a cash bond on the spot from the suspect – would create many severe difficulties, as we explain more fully below. There is no good reason for forcing this dilemma on law enforcement authorities.

Petitioner and the amici invoke the example of traffic violations, a class of offenses for which the authority to set bond is often delegated to officers in the field. The offender's driver's license, or sometimes a bond card provided by an organization acting as a surety, can be taken by the officer on the spot. See Ill.Sup.Ct.R. 526(a). Petitioner and the amici seem to believe that this approach should be used across the board, for all offenses punishable by fine only, or perhaps even for all misdemeanors.

But traffic violations are in this respect sui generis. A driver's license provides a suitable and widely available form of non-cash bond. When a cash bond is required, there are obvious reasons for a state or local government

not to want its officers in the field to collect cash from the suspect but instead to insist, as Arlington Heights has done here, that a supervisory officer at the station set and collect the bond. In fact, this is not simply a matter of Village policy: Illinois law specifically provides that cash bail or a bond may be accepted only in a police station or government building, and then only by certain officials. See 725 ILCS 195/1; Ill.Sup.Ct.R. 528.

Moreover, even in the case of traffic violations, it is not uncommon for officers to require the driver to accompany them to a stationhouse. This will occur when a driver does not have a license, or when the driver has only an out-of-state license. Under petitioner's approach, officers apparently would be precluded from doing this, unless the traffic offense was serious enough to be punishable by incarceration. The result would again be either that many more offenders will not appear for trial (and thus will often be able to escape prosecution), or that officers would have to set and collect bond at the scene.

Perhaps aware of this problem in the per se rule it proposes, amicus ACLU suggests (Br. 3, 27) that arrests could be allowed for any offense if there are "exigent circumstances," including "defiance of process." This is simply not a workable rule. The question whether a suspect is likely to appear for trial is exactly the question before a judicial officer at a bond hearing. It is not the sort of decision that officers in the field should be required to make at the scene of an arrest. Those officers are operating in unfamiliar and possibly threatening surroundings. The officers may know nothing at all about the aspects of the suspect's background that might make him more or less likely to abscond. But under the ACLU's

rule, if the officers resolve their doubts in favor of holding the suspect, their decision could be second-guessed at a trial in which they will face personal damages liability.

More important, officers in this situation are confronting an individual who, although at the moment suspected only of a misdemeanor, may have a serious criminal record or may be wanted on an outstanding charge.[9] Sometimes computer and communications technology will enable officers to obtain this information at the scene of the arrest. But even that will require the officers to prolong their encounter with the suspect at the scene, a course of action that is potentially dangerous; and in any event a per se rule cannot be made contingent on the availability of a certain form of technology. As this Court has recently noted, "studies suggest that as many as two-thirds of those arrested have prior criminal records, often from other jurisdictions." *Parke v. Raley*, 506 U.S. 20, 28 (1992). It will be especially difficult for officers at the scene to gain information about out-of-state records.

By bringing the suspect to the stationhouse, the officers can confirm the suspect's identity, check for any criminal record or outstanding charges, and allow the bond determination to be made in calm surroundings either by a judicial officer or by an experienced law

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[9] There are well-known examples of individuals, subsequently convicted of heinous crimes, who were first apprehended because they violated minor laws. See, *e.g.*, *Bundy v. State*, 455 So. 2d 330, 336 (Fla. 1984), cert. denied, 476 U.S. 1109 (1986) (serial murderer arrested at traffic stop); Stephen Braun, *Trooper's Vigilance Led to Arrest of Blast Suspect*, LA Times A1 (Apr. 22, 1995) (convicted Oklahoma City bomber Timothy McVeigh arrested at traffic stop).

enforcement officer to whom the authority has been specifically delegated. That is manifestly a reasonable way for officers to proceed.

This point also illustrates another important way in which petitioner's approach is unworkable. Petitioner and the amici propose that a sharp line be drawn between offenses punishable only by a fine and offenses punishable by imprisonment. But as the Court explained, in rejecting a proposal for a similar distinction in the context of *Miranda* warnings, it will often be difficult or impossible for police officers in the field to tell which category of offense they are dealing with. See *Berkemer v. McCarthy*, 468 U.S. 420, 430-31 (1984). "[T]he nature of [the] offense may depend upon circumstances unknowable to the police, such as whether the suspect has previously committed a similar offense or has a criminal record of some other kind. It may even turn upon events yet to happen, such as whether a victim of [the offender's reckless conduct] dies." *Ibid.* (footnotes omitted). Thus, for example, whether possession of a weapon is a fine-only offense, a misdemeanor, or a felony, may depend upon whether it is a first or second offense and whether the offender has a prior felony conviction – information that will seldom be available at the scene.

In addition, relatively minor differences in the circumstances surrounding an offense may make a dramatic difference in the severity of the punishment. "[O]fficers in the field frequently 'have neither the time nor the competence to determine' the severity of the offense for which they are considering arresting a person." *Berkemer*, 468 U.S. at 431 n. 13, quoting *Welsh*, 466 U.S. at 761 (White, J., dissenting). Under the municipal code of the City of Chicago, for example, trespass and possession of

burglar tools are both fine-only offenses. Chicago Mun. Code §§ 8-4-050; 8-4-180. An officer who encounters an individual prowling on another's property, with burglar tools, will be forced – under petitioner's approach – to decide whether there is probable cause to suspect the individual of burglary; if there is not, he cannot arrest the suspect but must issue a citation. Similarly, "manipulating telephone coin boxes" is a fine-only offense (§ 8-8-180); theft is not. Of course, the officer can stop the suspect on reasonable suspicion while more facts are ascertained. But if the stop lasts too long or becomes too restrictive, it may turn into an arrest. See, *e.g.*, *United States v. Sharpe*, *supra*. In all these respects, petitioner's approach unnecessarily forces officers to walk a tightrope – even though the evidence before them satisfies the traditional standard of probable cause to believe that a suspect violated the law.

Consequently, under petitioner's approach, police officers may be unable to treat an offender as seriously as his conduct and record require. They may be compelled to treat an offender who is in fact a felon as if he were a misdemeanant facing only a fine. Unless they have the ability to consult the offender's records quickly on the scene, they will be limited to issuing a citation and hoping that the offender will appear in court. Even petitioner concedes that the Fourth Amendment does not require that persons facing felony charges be treated in this way. But that is the result that petitioner's approach will often produce.

b. An arrest is also a means by which officers can assert control of a potentially threatening situation. Petitioner acknowledges that misdemeanor arrests are proper

for offenses involving a breach of the peace – thus recognizing that arrests can legitimately serve the function of maintaining order. But the concern goes well beyond offenses that themselves constitute breaches of the peace. When a person has been stopped by the police, that person – or others nearby – can become threatening even when the underlying offense itself does not involve either a felony or threatening conduct.

There are many possible examples. A gang member marking his turf with graffiti; a street vendor without a license, irate at being challenged by officers; a belligerent group blocking a sidewalk, intimidating neighborhood residents; a well-known and popular resident of a neighborhood, stopped for careless driving – all of these situations may involve fine-only offenses, but they may easily call for the police to exercise more control than they can plausibly assert by handing out citations.

This point is illustrated by the history of the common law rule permitting misdemeanor arrests for breaches of the peace. At common law, the notion of a "breach of the peace" was highly elastic: some cases held that "disobeying any act of parliament was a breach of the peace." Horace Wilgus, *Arrest Without A Warrant*, 22 Mich. L. Rev. 541, 574 (1923-24) (footnote omitted). In this nation, as we show below, nearly every state has, by statute, abandoned the breach of the peace limitation on the power of officers to arrest for misdemeanors. Some states have substituted a more detailed and expansive account of when misdemeanor arrests are permitted; others have recognized that no comparable limitation can be applied. Nearly all have recognized that the circumstances in which officers might justifiably need to make an arrest simply cannot be captured in a simple formula.

This Court has recognized the importance of allowing police officers at a potentially threatening scene to control the situation, even when there is no concrete reason at all to suspect a threat, and even by making a seizure unsupported by probable cause. In *Michigan v. Summers*, 452 U.S. 692 (1981), the Court held that police could seize an individual leaving a house where they were about to execute a search warrant. The Court noted that "no special danger to the police is suggested by the evidence in this record," but explained that the seizure was supported by "the interest in minimizing the risk of harm to the officers" because "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 702-03. In *Maryland v. Wilson*, 117 S.Ct. 882 (1997), the Court held that officers may order the passenger out of a car that has been lawfully stopped, even when there is no basis for suspecting the passenger of any offense. The Court again relied on the need for officers to " 'exercise unquestioned command of the situation' " (*id.* at 886; citation omitted). It is true that the seizures approved in *Summers* and *Wilson* will generally be less intrusive than an arrest – although there may well be circumstances in which those seizures, particularly the kind approved in *Wilson*, will be perceived by the subject as more intrusive and threatening than the brief and relatively amicable trip to the stationhouse in this case. But by the same token the officers in this case had probable cause to justify the seizure; in *Summers* there was not probable cause, and in *Wilson* no suspicion at all. In both cases the Court made clear that there was no need for the officers to make any specific showing of exigency.

c. As we noted above, petitioner has waived any argument based on a requirement that a warrant be obtained before a misdemeanor arrest. But in any event, a warrant requirement, were one to be imposed, would "constitute an intolerable handicap for legitimate law enforcement." *Gerstein*, 420 U.S. at 113. The Court reached this conclusion with respect to felony arrest in *Watson*, 423 U.S. at 417, and there is no reason to reach a different conclusion with respect to any other category of offenses.

In general, of course, apprehending a felon will be more important that apprehending a misdemeanant. But see *Tennessee v. Garner*, 471 U.S. 1, 14 (1985) (footnote omitted) ("[N]umerous misdemeanors involve conduct more dangerous than many felonies."). But by the same token, a felony arrest is much more intrusive. And the volume of misdemeanor arrest is vastly greater. Seeking warrants for misdemeanor arrests, or even fine-only arrests, would therefore impose a very substantial burden on law enforcement agencies, with at most limited gains.

Less obvious, but no less important, are the anomalies and distortions that would be created if a warrant were required for misdemeanor arrests but not for felony arrests. Officers who have probable cause to believe a suspect committed a misdemeanor might delay the arrest until the suspect committed a felony, so that they did not have to obtain a warrant. Often the same behavior constitutes both a major offense and a lesser offense, and officers have discretion to decide what to charge. If a warrant were required only for the less serious offense, officers would have a strong incentive to arrest offenders for felonies – thus greatly increasing the stigma, probably causing the initial detention to be harsher, and making it more difficult for the offender to obtain release on bail –

even if ordinary sound police practice would be to charge a lesser offense. And of course legislators could nullify the warrant requirement simply by reclassifying offenses or by increasing the range of possible sentences to include incarceration. No purpose would be served by inducing legislatures to do that.

Finally, a warrant requirement will of course necessitate an exception for exigent circumstances. The impossibility of defining when such circumstances exist demonstrates why a warrant requirement would be unworkable here, as it is for felony arrests. When police officers are conducting a search for evidence or contraband, it is possible to specify what constitutes exigent circumstances: essentially a significant risk that the evidence will be lost or destroyed. Arrests, however, grow out of a face-to-face confrontation between the police and a suspect – often with others present, either members of the public or intimates of the suspect – and such a situation is almost always more fluid and multi-faceted than that involved in a search for evidence. What might begin as a polite encounter between a citizen and an officer may escalate into a situation requiring an arrest. The police may arrive at a scene with the intention only of investigating but then determine that an arrest is in order. Officers with probable cause might initially plan only to warn the suspect but then discover that a hostile crowd has gathered and an arrest is needed. Officers who initially believe that a citation and summons will be sufficient might decide, after seeing the suspect's reaction, that the danger of his absconding is too great and an arrest is in order. When officers are confronted with such a wide array of potentially threatening circumstances, it

would seriously inhibit effective law enforcement to subject them to second-guessing on the ground that they might have anticipated the events that occurred and obtained a warrant.

2. A nationwide constitutional limit on arrests for fine-only offenses is both unnecessary and harmful in view of the valuable diversity of approaches among the states.

a. Petitioner and his supporting amici detail numerous state laws governing arrests for misdemeanors and fine-only offenses; they suggest that these laws show that this Court should adopt a nationwide per se rule as a matter of constitutional law. In fact the variety of state laws shows exactly the opposite.

To begin with, in very few states would the arrest in this case have been unlawful.[10] Petitioner and his supporting amici, in their surveys of state law, appear to claim at most that eight states forbid arrests for fine-only offenses. ACLU Am. Br. 15 n. 17. Both petitioner and the amici assert that many states still generally endorse the rule that misdemeanor arrests may be made only for offenses committed in the officer's presence. Pet. Br. 14-21; ACLU Am. Br. 15-17. But as the lower courts found, and as we show below, the offense here *was* committed in the officers' presence. Thus it appears that petitioner's approach would have the effect of declaring unconstitutional, in whole or part, the laws of at least 42 states, even on petitioner's account.

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[10] The various state laws governing arrests are surveyed in Part II B of the Brief for the National League of Cities, et al., as amici curiae.

What is most striking about state law on this subject, however, is how it is both highly varied and highly complex. Even among states that seem to retain the "presence" requirement, there is a multifarious pattern of exceptions. And states that seem sympathetic to petitioner's view in fact allow law enforcement authorities a great deal of flexibility.

California's statute is an example. Cal. Penal Code § 853.6 begins by stating, superficially in keeping with petitioner's general approach, that "[i]n any case in which a person is arrested for an offense declared to be a misdemeanor, including a violation of any city or county ordinance * * * that person shall * * * be released" with a citation. But the statute then immediately provides an important exception, for domestic violence cases:

> In any case in which a person is arrested for a misdemeanor violation of a protective court order involving domestic violence * * * the person shall be taken before a magistrate instead of being released according to the procedures set forth in this chapter, unless the arresting officer determines that there is not a reasonable likelihood that the offense will continue or resume or that the safety of persons or property would be imminently endangered by release of the person arrested.

Recognizing, however, the difficulty of defining such an "exigent circumstances" exception, the statute directs "each city, county, or city and county [to] develop a protocol to assist officers to determine when arrest and release is appropriate, rather than taking the arrested person before a magistrate."

The statute then goes on to provide a number of additional, substantial exceptions to the requirement of proceeding by citation (Cal. Penal Code § 853.6(i); emphasis added):

> Whenever any person is arrested by a peace officer for a misdemeanor, that person shall be released according to the procedures set forth by this chapter *unless* one of the following is a reason for nonrelease * * * :
>
> (1) The person arrested was so intoxicated that he or she could have been a danger to himself or herself or to others.
>
> (2) The person arrested required medical examination or medical care or was otherwise unable to care for his or her own safety.
>
> (3) The person was arrested under one or more of the circumstances listed in Sections 40302 [which includes the failure to produce satisfactory evidence of one's identity] and 40303 [which enumerates sixteen motor vehicle offenses] of the Vehicle Code.
>
> (4) There were one or more outstanding arrest warrants for the person.
>
> (5) The person could not provide satisfactory evidence of personal identification.
>
> (6) The prosecution of the offense or offenses for which the person was arrested, or the prosecution of any other offense or offenses, would be jeopardized by immediate release of the person arrested.
>
> (7) There was a reasonable likelihood that the offense or offenses would continue or resume, or that the safety of persons or property would be imminently endangered by release of the person arrested.

(8) The person arrested demanded to be taken before a magistrate or refused to sign the notice to appear.

(9) There is reason to believe that the person would not appear at the time and place specified in the notice. The basis for this determination shall be specifically stated.

The complexity of this and many other state statutes, and the variety among state statutes, are significant for a number of reasons. First, they reveal that this is the kind of issue that can be readily addressed through the political process in each state and locality. Only a very small percentage of the population is subjected to the kinds of police conduct that this Court has traditionally limited by strict prophylactic rules – for example, searches of residences and custodial interrogation. But nearly everyone would be threatened if police had an excessively broad power to arrest for minor offenses, and the legislators have responded accordingly. Petitioner makes much of the fact that most states "circumscribe an officer's power to make a warrantless arrest in non-felony cases." Pet. Br. 13 (footnote omitted). Contrary to petitioner's suggestion, however, that is a reason for this court *not* to intervene. The profusion of state statutes shows that democratically elected legislators are fully able to address this issue. Cf. *Robinette*, 117 S.Ct. at 421-22 (Ginsburg, J., concurring); *id.* at 427-28 (Stevens, J., dissenting).

Moreover, the variation and complexity in these statutes shows that a single nationwide rule is unlikely to work. Circumstances differ from state to state. "Minor" offenses in urban areas are often not minor at all; as we explain below, important policing strategies emphasize the crucial need to enforce the laws against supposedly minor crimes very vigorously. Those crimes can have a

profound effect on urban neighborhoods. Indeed, the effective enforcement of laws against "minor" offenses may be the single best way of reducing the number of very serious offenses. But predominantly rural states are faced with different circumstances. There, minor offenses may have less of an impact on others, and the distance that an arrestee must travel to the police station may be much greater. As California's statute shows, states may have very specific ideas about what constitutes the kind of exigency that requires an arrest rather than a citation, and specific ideas about how to implement the regime they have defined. Given these conditions, and the states' responsiveness to them, it would be artificial – and potentially destructive of valuable state and local experimentation – to insist on uniformity as a matter of federal constitutional law

b. In addition, this is an area in which the incentives of police officers will not generally be at odds with the constitutional values at stake. Traditionally when the Court has adopted per se rules limiting police conduct, it has done so in order to counteract the systematic tendency of "zealous officers" to be too aggressive while "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). Thus the Court requires search warrants because officers on the trail of crucial evidence may be too quick to decide that they have probable cause for a search; the Court requires *Miranda* warnings because officers who have a suspect in custody may, in their zeal to solve the crime, overreach and use coercive interrogation tactics. In these situations and others, officers who are zealously trying to enforce the law may have some tendency to infringe constitutional values.

But police officers and police departments have no systematic interest in making unnecessary arrests for misdemeanors and fine-only offenses. On the contrary, they have every reason to use citations – or warnings – whenever possible. Arrests are time-consuming and generally force officers to do much greater amounts of paperwork – thus detracting from their "competitive enterprise of ferreting out crime." For this reason, officers zealously engaged in that enterprise are likely to *avoid* arresting individuals for less serious offenses, whenever they can conscientiously do so.[11] This is no doubt one reason that state and local governments have limited officers' authority to make arrests for misdemeanors. And for this reason, too, this Court's intervention here is unwarranted.

c. We do not overlook the possibility that the power to arrest people for misdemeanors or fine-only offenses might be used pretextually or for purposes of harassment. Petitioner's own self-serving claims of harassment in this case are belied both by the circumstances of the arrest and by the fact – not only conceded but emphasized by petitioner – that the arrest was made pursuant to a uniformly applied Village policy. Nonetheless, it is certainly possible to imagine cases in which the power to

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[11] The contrast with *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), is illuminating. Once an offender has been jailed, both bureaucratic inertia and the desire to investigate further might lead to an excessively long confinement. For this reason the court established a presumption that the Fourth Amendment is violated when an arrestee is confined for more than 48 hours without appearing before a judicial officer. By contrast, an officer who can, consistent with his or her duties, escape the paperwork of taking a person into custody is likely to do so whenever possible.

arrest for a misdemeanor or fine-only offense might be used for improper purposes.

An across-the-board prohibition of an entire category of arrests would, however, be a much too far-reaching way of addressing this issue. Nowhere do police officers enjoy more discretion than in deciding whether to stop vehicles for traffic offenses, since traffic laws are so detailed and violations are so ubiquitous. But this Court – recognizing both the complexity of the situations involved and the ability of state and local governments, including state courts, to address the issue – has consistently refused to adopt per se rules to limit police discretion and reduce the danger of harassment and pretext. See *Whren v. United States, supra; Ohio v. Robinette, supra.* Indeed the Court has, if anything, enlarged the authority of police officers to take steps to control the situation that arises after a traffic stop. See *Maryland v. Wilson, supra; Pennsylvania v. Mimms,* 434 U.S. 106 (1977).

An individual who believes police officers have acted improperly is free to invoke the remedies made available by state and local governments – which, as we have noted, have shown their ability to limit officers' authority. Beyond that, an individual can attempt to show that the manner of an arrest was abusive; that he was held for an excessively long time before a probable cause determination; or that he has been singled out for prosecution on an impermissible basis. Broader federal constitutional limitations, of the kind petitioner seeks, would only hamper law enforcement efforts while, in all likelihood, having little if any effect on police officers who are genuinely unscrupulous and bent on harassment.

3. Effective police work against so-called minor offenses is a crucial law enforcement priority.

a. Perhaps the deepest flaw in petitioner's argument is his implicit premise that little harm is done if the enforcement of laws against "minor" offenses is curtailed. One of the most significant developments in criminology in recent years has been the renewed emphasis on the vigorous enforcement of laws against so-called minor crimes. This emphasis is supported by recent social science studies showing that the prevalence of minor crimes can have a devastating effect on a community. See, *e.g.*, Wesley G. Skogan, *Disorder and Decline* (1990); George Kelling and Catherine M. Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (1996); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 U. Va. L. Rev. 349 (1997).

The minor crimes that fall into this category include many offenses that are typically punishable by fines only: "noisy neighbors, accumulating trash, poorly maintained buildings, and sundry problems related to congregating bands of youths" (Skogan, *Disorder and Decline* 2) as well as "vandalism, aggressive panhandling, public drunkenness, unlicensed vending, public urination, and prostitution" (Kahan, 83 U. Va. L. Rev. at 368). Many of these offenses would not constitute breaches of the peace at common law. That is certainly true of, for example, code violations relating to trash, building conditions, and street vending. But it appears also to be true of "talking loudly in the street in the presence of an officer, who ordered the parties to be quiet"; " 'turning toward the wall for a particular purpose' of relief"; "obstructing the free passage across a bridge; or refusing to move on, on a sidewalk, at the request of an officer": none of those

offenses was viewed as a breach of the peace that would justify a misdemeanor arrest. Wilgus, *Arrest Without A Warrant*, 22 Mich. L. Rev. 673, 703-04 (1923-24) (footnotes omitted). Prostitution and panhandling also may not be breaches of the peace.

There is powerful evidence that offenses of this kind are not just annoyances; they are one of the leading causes of the disintegration of urban communities. For example, one study, based on 40 urban areas with differing crime rates, found a high correlation between "disorder" – defined in large part by the presence of low-level crimes[12] – and serious crime. The high correlation persisted even after controlling for the effects of poverty, racial composition of the neighborhood, and neighborhood instability. Skogan, *Disorder and Decline* 73, 75. Disorder also correlated with perceptions of violent crime (*id.* at 74-75) and instability in the neighborhood housing market (*id.* at 84).

Law enforcement officers should be permitted to combat these widespread but severely damaging minor offenses in the way they traditionally combat crime: by making arrests if there is probable cause. The regime that petitioner advocates is simply not a practical alternative. Obtaining a warrant is a time-consuming effort that will

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[12] "Disorder" was measured by a surveys that asked about "problems with groups of loiterers, drug use or sales, vandalism, gang activities, public drinking, and street harassment" as well as "building abandonment, garbage or litter on streets and sidewalks, and junk and trash in vacant lots." Skogan, *Disorder and Decline* 51. All of these categories of disorder involve offenses, many of which (especially the code violations associated with the latter group) will typically be punished only by fines. In addition, none of those in the latter group constitutes a traditional breach of the peace.

make it virtually impossible to enforce these laws on a large scale. A citation issued to a perpetrator of one of these offenses will often be ignored.

Indeed officers might be better advised to do nothing instead of issuing a futile citation and heightening the impression that the law cannot be effectively enforced. The point of enforcing the law against offenses of this kind is to dispel the impression that a community is in a state of decline, in which the law is widely disobeyed with impunity. See Kelling and Coles, *Fixing Broken Windows* 20 ("[D]isorderly behavior unregulated and unchecked signals to citizens that the area is unsafe. * * * Ultimately the result for such a neighborhood, whose fabric of urban life and social intercourse has been undermined, is increasing vulnerability to an influx of more disorderly behavior and serious crime"). If officers cannot move against offenders swiftly, effectively, and on a large scale, their efforts may be not only vain but counterproductive.

Of course this does not justify dispensing with the traditional requirements of probable cause and reasonableness. And state and local statutes and judicial decisions will still restrain police officers. But at a time when the control of so-called minor offenses has come to be seen as a matter of great importance and urgency, it would be inopportune to preempt state and local efforts with a new, inflexible Fourth Amendment rule.

Amicus NACDL insists (Br. 14) that "quality of life" crimes would constitute an exception to the proscription on arrests for fine-only offenses. But it makes little sense to establish a supposed rule against arrests for such offenses, only to allow a broad and ill-defined exception that will lead to litigation and cause police officers to

hesitate in doing their jobs. Consider, for example, the following offenses, all of which are punishable only by fines under the Municipal Code of the City of Chicago:

- trespass (§ 8-4-10)
- vagrancy (§ 8-4-100)
- damages to public property (§ 8-4-120)
- possession of paint or marker with intention to deface (§ 8-4-130)
- throwing objects on an athletic field (§ 8-4-190)
- soliciting for prostitution (first and second offenses) (§ 8-4-130)
- indecent exposure (§ 8-8-080)
- gambling (§ 8-12-010)
- drinking by minors (§ 8-16-050)
- possession of alcohol by a minor, or delivering alcohol to a minor (§ 8-16-060)
- possession of spray paint or marker by a person under 18 (§ 8-16-096)
- discharge of a firearm (§ 8-24-010)
- defacing public property (§ 10-8-380)
- noise violations (§ 10-4-1110)
- throwing objects in public places of amusement (§ 7-28-180)
- smoking in public conveyances (§ 7-32-020)

It is difficult to see why all of these should not be considered "quality of life" offenses – as should many instances of operating an unlicensed business. All of them concern conduct that can seriously undermine the quality of life in an urban environment. The way to deal with these offenses is to allow officers to act as the Fourth Amendment permits – to arrest on probable cause – and to allow state and local regulation (along with simply the press of police work) to provide the necessary check on

police, rather than to adopt a prophylactic rule that is likely to produce unfortunate consequences.

b. The most basic error of petitioner's approach lies in the assumption that, as amicus ACLU puts it (Br. 21), it is unfair "to allow detention at the sole whim of the police for an offense that could not have led to incarceration upon conviction." Of course petitioner was detained on the basis of probable cause, not at the "whim' of the police. More fundamentally, however, this argument misconceives the relationship between arrest and punishment. An arrest is not part of the punishment for an offense; it would violate the Constitution to use a period of detention (or any other sanction) to punish *any* suspect who has not been convicted, no matter how serious the offense with which he is charged. An arrest serves the purposes of ensuring a suspect's appearance at trial and preserving order at the scene of the offense. Those purposes may furnish as strong a justification for an arrest in a case involving a fine-only offense as in a case involving an offense that can lead to imprisonment.

The punishment that a legislature designates for an offense is a function of many factors unrelated to whether it is appropriate to arrest a suspect. A legislature may, for example, choose to punish an offense solely by a fine not because it considers the offense to be less serious but because the class of offenders is likely to be highly responsive to economic incentives. This will often be true of environmental offenses, which are prompted by simple economic calculation on the part of the offender and which can be deterred if they are made unprofitable. See, *e.g.*, Chicago Mun Code § 7-28-390 (unauthorized dumping on a public way punishable by fine only).

Alternatively, the decision to punish an offense by a fine may reflect the legislature's view that the offense, while serious, does not require incapacitation. Or the decision to make an offense punishable only by a fine may simply reflect a legislative determination that incarceration – a harsh and expensive punishment – should be used only for the most dangerous or hardened offenders, and that those who commit, for example, environmental offenses or criminal fraud are not such offenders. See, *e.g.*, Chicago Mun. Code § 4-72-170 (offenses relating to the licensing and inspection of day care centers punishable by fine only); Chicago Mun. Code §§ 4-144-210, 8-24-060 (certain weapons offenses punishable by fine only); Chicago Mun. Code § 4-60-200 (regulations of establishments with liquor licenses punishable by fine only).

In all of these cases, the reasons for arresting a suspect – in particular, the need to make sure he will appear at trial – are very strong. Indeed, if the legislature is relying on economic incentives to deter people who are committing crimes simply out of calculation, and not impulsively, a credible threat of enforcement is crucial. The fact that the offense is not punishable by incarceration has no bearing on how important it is that the law be effectively enforced.

C. Traditional Common Law Limitations, To The Extent They Are Incorporated In The Fourth Amendment, Do Not Invalidate The Arrest In This Case.

1. Petitioner and his supporting amici rely on what they characterize as the "common law rule" that a warrantless arrest for a misdemeanor is permissible only

when the offense occurs in the presence of the arresting officers and involves a breach of the peace. See, *e.g.*, Pet. Br. 9-11. As we explain below (pages 46-48), to the extent this common law rule survives as a traditional limitation on the authority of police offices, it survives only as to the requirement that a misdemeanor occur in the arresting officer's presence; the limitation to cases involving breaches of the peace has not survived. As both courts below found, petitioner's offense in this case *did* occur in the presence of the officers (Pet. App. 6, 18) – thus making the arrest lawful even under the common law rule.

More fundamentally, however, the common law principle on which petitioner relies is not among those that have been incorporated into the Fourth Amendment. Rather, common law limits on the power to arrest apply only in the absence of a statute further expanding an officer's authority. " '[I]t is generally recognized today that the common law authority to arrest without a warrant in misdemeanor cases may be enlarged by statute, and this has been done in many of the states.' " *Welsh v. Wisconsin*, 466 U.S. 740, 756 (1984) (White, J., dissenting), quoting Edward Fisher, *Laws of Arrest* 130 (1967).

a. Even in the heyday of the common law, public officials were authorized by statute to make warrantless arrests for non-felonies that were not breaches of the peace. Hawkins's *Pleas of the Crown* gives this account:

> As to the power of watchmen, it is farther enacted by the said *statute of Winchester*, c. 4, "That if any stranger do pass by the watch, he shall be arrested until morning. And if no suspicion be found, he shall go quit; and if they find cause of suspicion, they shall forthwith deliver him to the sheriff, and the sheriff * * * shall keep

> him safely until he be acquitted in due manner. * * * "

3 William Hawkins, *A Treatise of Pleas of the Crown* (1795), ch. 13, § 5 at 173. Hawkins states that this statute also authorized bailiffs " 'to make inquiry of all persons being lodged in the suburbs, or in foreign places of the towns; and if they do find any that have lodged or received any strangers or suspicious persons' " the bailiffs "may lawfully arrest and detain any such stranger, being found under probable circumstances of suspicion, until he shall give a good account of himself." *Id.*, § 12 at 178. In the case of both the watchmen and the bailiffs, these are arrests without "process from some court of record." *Id.* at 172.

Blackstone gives a similar account, again discussing arrests "without warrant" (4 *Blackstone's Commentaries* *289; italics omitted):

> Watchmen, either those appointed by the statute of Winchester, 13 Edw. I c. 4, to keep watch and ward in all towns from sunsetting to sunrising, or such as are mere assistants to constables, may *virtute officci* arrest all offenders, and particularly nightwalkers, and commit them to custody until morning.

The reason for this statutory enlargement of the common law authority sheds light on the Fourth Amendment issue today. At common law, arrests for misdemeanors – limited, in the absence of a warrant, to breaches of the peace committed in the officer's presence – were "made not so much for the purpose of bringing the offender to justice as in order to preserve the peace" (I James Fitzjames Stephen, *A History of the Criminal Law of England* 193 (1883); see *Carroll v. United States*, 267 U.S. 132, 157 (1925)). In a largely rural society with little mobility, in which the inhabitants of villages knew each other well,

there was little concern about the risk of a misdemeanant's escaping. But strangers presented a greater problem. Accordingly, by statute, public officials were authorized to arrest a stranger, without a warrant, on suspicion, and hold him until the matter was resolved.

Today, of course, the case of the stranger who might flee – an exception at common law – has become the rule. The leading authorities have, accordingly, viewed the statutory expansion of the common law power to arrest as eliminating an archaic "handicap to our modern law enforcement officers [that] presents a formidable obstacle to protection of the public." Fisher, *Laws of Arrest* 128.

b. In the United States, it has consistently been understood that the common law arrest power can be enlarged by statute. *Kurtz v. Moffitt*, 115 U.S. 487 (1885), which appears to be the earliest case in which this Court invoked the common law rule, makes this clear. The issue in *Kurtz* was whether local police officers had the power to arrest an alleged deserter from the army. The Court stated: "If a police officer or a private citizen has the right, without warrant or express authority, to arrest a military deserter, that right must be derived either from some rule of the law of England which has become part of our law, *or from the legislation of Congress*." *Id.* at 498 (emphasis added). The Court then, after stating and applying the common law rule and English statutes, carefully considered American statutes as well. *Id.* at 498-505. The Court nowhere suggested that the federal legislation enlarging the common law authority might violate the Fourth Amendment.

Bad Elk v. United States, 177 U.S. 529 (1900) – the next case in which this Court applied the common law principle – demonstrates the same point. In *Bad Elk*, the Court held that a trial judge erred in instructing a jury that

police officers had acted lawfully in attempting to arrest the defendant, who was convicted of murder on an Indian reservation for killing one of the officers. In reaching its conclusion, the court first reviewed the common law rule and concluded that the attempted arrest did not comply with it. *Id.* at 534-35.

The Court then proceeded, however, to consider whether there was a state or federal statute "giving any right to [the decedent] to arrest an individual without a warrant, on a charge of misdemeanor not committed in [his] presence." 177 U.S. at 535. After reviewing the applicable statutes in detail, the Court concluded that they also did not authorize the arrest. *Id.* at 535-56. On petitioner's theory – that the common law establishes a constitutional minimum – the court's examination of the statutes is inexplicable. See also *Johnson v. United States*, 333 U.S. 10, 15 & n. 5 (1948) (stating without qualification that "[s]tate law determines the validity of arrests without warrant" in a case in which state law departed from the common law rule.)

The common law rule was, therefore, understood only to provide a limitation that, like other common law doctrines, can be altered by statute. It is because of this understanding that, for over 200 years, this Court " 'has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant.' " *Watson*, 423 U.S. at 417-18, quoting *Gerstein*, 420 U.S. at 113. Indeed the lower courts and commentators have considered it axiomatic that, whatever additional restrictions might apply under state common or statutory law, the Fourth Amendment permits a suspect to be arrested on probable cause – for *any* offense. See, *e.g.*, *Allen v. City of Portland*, 73 F.3d 232, 236 n. 2 (9th Cir. 1995) ("A

warrantless misdemeanor arrest which violates state law does not implicate the Fourth Amendment unless there is no probable cause"); *United States v. Smith*, 73 F.3d 1414, 1416 (6th Cir. 1996); *Fields v. City of South Houston*, 922 F.2d 1183, 1189 (5th Cir. 1991) ("The United States Constitution does not require a warrant [to arrest] for misdemeanors not occurring in the presence of the arresting officer."); *Higbee v. City of San Diego*, 911 F.2d 377, 379 & n. 2 (9th Cir. 1990); *Fisher v. Washington Area Metropolitan Transit Authority*, 690 F.2d 1133, 1138-39 & n. 6 (4th Cir. 1982). One of the leading cases in the area holds (*Street v. Surdyka*, 492 F.2d 368, 372 (4th Cir. 1974)):

> The Fourth Amendment protects individuals from unfounded arrests by requiring reasonable grounds to believe a crime has been committed. The states are free to impose greater restrictions on arrests, but their citizens do not thereby acquire a greater federal right.

And the leading treatise states flatly:

> As for the common requirement of a warrant for misdemeanors not occurring in the presence [of the arresting officer], it is likewise not grounded in the Fourth Amendment. * * * [T]he presence test is not mandated by the Fourth Amendment.

3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (3d ed. 1996) § 5.1(b) at 21, 23.

c. There is no basis for any suggestion (see, *e.g.*, NACDL Am. Br. 4) that because petitioner's offense is punishable only by a fine, not by jail, it would not have been treated even as a misdemeanor at common law. Many offenses at common law were punished by fines – including some that are quite similar to petitioner's. A first offense of provision of unwholesome goods was

punishable by an "amercement" (4 *Blackstone's Commentaries* *162). "[O]ffensive trades and practices" were a species of public nuisance punishable by a fine. *Id.* at *167. "[S]tage-plays unlicensed" were also a public nuisance, subject to fine and suppression. *Id.* at *168. The "making and selling of fireworks and squibs" (*ibid.*) was treated in the same fashion. Obstructing highways, bridges, or rivers, was also punishable by fines. *Id.* at *167.

Amicus NADCL misleadingly argues that offenses like petitioner's were "similar to summary offenses" and asserts that "the common law did not allow for arrests" for such offenses. Br. 4. Summary offenses, however, were not creatures of the common law; they were simply those offenses that, by act of Parliament, were to be tried without a jury. 4 *Blackstone's Commentaries* *277. They were "so numerous, and of such a varied character, that it would be practically impossible * * * to give anything like a full account of them within any moderate compass." III Stephen, *History of the Criminal Law of England* 263. These were not just minor offenses; they included, for example, "all trials of offences and frauds contrary to the laws of the excise, and other branches of the revenue" (4 *Blackstone's Commentaries* *278) as well as offenses like disorderly conduct (*ibid.*). The punishments they assessed were by no means limited to fines; they could impose corporal punishment on the defendant. *Id.* at *278, *280.

Blackstone – whose stature among the colonists was, of course, unparalleled – *criticized* the summary courts for not arresting the defendant. It is a virtue of the common law courts that they "never suffer[ ] any fact * * * to be tried, till [they] have previously compelled an appearance by all concerned." 4 *Blackstone's Commentaries* *280. It was

the common law courts that insisted the summary courts summon the accused, rather than proceeding ex parte. *Id.* at *279. Blackstone also, of course, criticizes the summary courts for not using a jury. *Id.* at *277-78. In all of these respects, the practice of the summary courts simply sheds no light on the treatment of offenses like petitioner's at common law.[13]

It is clear, however, that American courts, from the beginning of the nineteenth century, authorized warrantless arrests for violations of regulatory ordinances like the one petitioner violated:

> It is impossible to classify or enumerate the great number of such misdemeanors or breaches of ordinances for which peace officers may arrest, without a warrant, if committed in their presence. They include violations of health and food regulations; Sunday traveling or entertainments, nuisances on streets or sidewalks, or loitering, or meetings on same, cruelty to animals, vagrancy, drunkenness, disturbances in school houses, or at elections * * *

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[13] Amicus NACDL also argues that petitioner's offense is civil in nature under Illinois law. This claim has never been part of petitioner's argument, and in any event appears foreclosed by *Whren v. United States*, *supra*, which involved a "civil traffic stop" (116 S.Ct. at 1771) that the Court treated indistinguishably from stops that technically involved criminal violations. See *id.* at 1774 (noting that *United States v. Robinson*, 414 U.S. 218 (1973) involved a "traffic-violation arrest (of the sort here)").

We note that amicus's discussion mischaracterizes Illinois law in certain respects as well. *People v. Datacom Systems Corp.*, 585 N.E.2d 51 (Ill. 1991), for example, concerned the status of fines for municipal parking violations under the Illinois Collection Agency Act – not for any purpose having to do with criminal law enforcement. See *id.* at 56-60.

Wilgus, *Arrest Without A Warrant*, 22 Mich. L. Rev. at 706-07. Indeed, the law review article from which amicus NACDL adapts its discussion acknowledges that with "the advent of a professional police force * * * arrest rules began to change. Legislatures then adopted statutes granting sweeping arrest powers [and] * * * authoriz[ing] custodial arrests * * * 'for many ordinance and regulatory violations, that had previously not been subject to arrest at all.' " Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temple L. Rev. 221, 258-59 (1989) (footnotes omitted). It simply cannot be claimed, therefore, that there is a tradition of precluding arrests for offenses like petitioner's.

2. a. Even if the common law limits on an officer's power to arrest are understood to specify constitutional requirements, and are not subject to modification by statute, petitioner is still not entitled to prevail. This Court " 'has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage.' " *Tennessee v. Garner*, 471 U.S. 1, 13 (1985), quoting *Payton*, 445 U.S. 591 n. 33. In determining whether the Fourth Amendment incorporates a common law principle, the Court has considered not just the historic common law practice but whether there is "a clear consensus among the States adhering to that well-settled common law rule." *Payton*, 445 U.S. at 590, citing *Watson*, 423 U.S. at 421-22. At the most, the common law principles apply when they "ha[ve] been generally adhered to by the traditions of our society" (*County of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting)). See, *e.g.*, *Wilson v. Arkansas*, 514

U.S. 927, 933 (1995) (citations omitted) (common law limitation "was woven quickly into the fabric of early American law" and "is 'embedded in Anglo-American law.' ").

The common law rule limited the privilege to arrest to cases in which the offense (i) was committed in the officer's presence and (ii) constituted a breach of the peace. It is entirely clear that only the first of these limits has survived in American law. The requirement that a misdemeanor arrest can be made only for a breach of the peace has been widely disavowed in this country.

On this point the authorities are unanimous. "As a general rule it may be said that the modern peace officer has authority to arrest without a warrant for any public offense committed in his presence, *and this includes city ordinance violations.*" Fisher, *Laws of Arrest* 130 (1967) (emphasis added; footnote omitted). See, *e.g.*, 3 LaFave, *Search and Seizure* §5.1(b) at 13-14 ("By far the most common statutory provision removes the breach of the peace limitation and thereby permits arrest without warrant for *any* misdemeanor committed in the arresting officer's presence.") (emphasis in original; footnote omitted); *Higbee v. City of San Diego*, 911 F.2d 377, 379 & n. 2 (9th Cir. 1990) ("court cases and statute[s] * * * allow arrest for *any offense* committed in the presence of the police officer. * * * This practice has never been successfully challenged and stands as the law of the land.") (emphasis in original).

One recent survey concludes that "[o]nly a few American jurisdictions still substantially follow the common law rule limiting warrantless misdemeanor arrests to breaches of the peace committed in the arresting officer's presence, and even these permit some minor exceptions." William A. Schroeder, *Warrantless Misdemeanor*

Arrests and the Fourth Amendment, 58 Mo. L. Rev. 771, 784 (1993) (footnotes omitted). In addition, "many jurisdictions * * * authorize warrantless arrests for misdemeanors not committed in the arresting officer's presence if specified circumstances exist or if the arrest is for specified misdemeanors" (*id.* at 777-78), and "the trend away from the common law rule has accelerated" (*id.* at 785).

Similarly, the ALI Model Code of Pre-Arraignment Procedure, on which the Court has relied in determining the scope of Fourth Amendment limits on the power to arrest (*Watson*, 423 U.S. at 422), permits an arrest "for a misdemeanor or petty misdemeanor in the officer's presence" and for a misdemeanor if the officer reasonably believes that the person may escape apprehension or may injure others. See *id.* at 422 n. 11. Petitioner and his supporting amici attempt to paint a different picture, but, as we have noted, they are unable to identify more than a handful of states that retain anything more than the requirement that the offense be committed in the officer's presence. See Pet. Br. 13-21; ACLU Am. Br. 12-17.

In keeping with the American rejection of the breach of the peace element, this Court's descriptions of the common law rule have, for the most part, simply omitted that requirement. See, *e.g.*, *Watson*, 423 U.S. at 418 ("the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence"); *Bad Elk v. United States*, 177 U.S. at 534 ("[A]n officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence."); *Kurtz v. Moffitt*, 115 U.S. at 498-99 ("By the common law of England, neither a civil officer nor a private citizen had the right without a warrant to make an arrest for a crime

not committed in his presence, except in the case of felony").

b. Thus, even if the common law rule governing misdemeanor arrests is understood as a constitutional limitation, the part of the common law principle that has taken root in American law permits – at the very least – warrantless misdemeanor arrests, on probable cause, for any offense committed in the officer's presence. It follows that, even if the common law rule – as it has evolved – is incorporated into the Fourth Amendment, petitioner's arrest was lawful: his offense was committed in the arresting officers' presence, as both lower courts found. Pet. App. 6, 15-16.

Even petitioner is forced to concede that this finding is "literally correct" (Pet. Br. 14 n. 16). The Arlington Heights ordinance makes it "unlawful for any person to conduct, engage in, maintain, operate, carry on or manage a business" without a license. The officers saw a business office set up to conduct telephone solicitations, with telephones on employees' desks (J.A. 45; Ricci Dep. 16-20); there were employees on the premises (J.A. 45; Ricci Dep. 16-17); petitioner admitted to the officers that he was engaged in telemarketing (J.A. 64); petitioner failed to produce a business license when the officers requested it (J.A. 64-65); and the officers themselves had searched the public records and not found any such license (J.A. 70). It is difficult to imagine what else petitioner would have had to do in order to violate the ordinance in the officers' presence.

Petitioner's only apparent answer to this point is that the "presence" requirement requires that "the wrongdoing be readily apparent to the officers" and "that petitioner did not have a license did not become readily

apparent until petitioner searched for, and did not locate, the license" (Pet. Br. 14 n. 16) – but of course petitioner did those things in the officers' presence. In addition, the officers themselves had had the public records checked. "If one is apprised by any of his senses that a crime is being committed; knows it by the evidence of his own senses; has direct personal knowledge through his sight or hearing or other sense of it, whereby he is able to detect it as the act of the accused, – it is 'in his presence' " (Wilgus, 22 Mich. L. Rev. at 680; footnotes omitted). By this standard the presence requirement was plainly satisfied here. In any event, "the in presence requirement is satisfied when a person admits to the police that he is presently violating the law" (3 LaFave, *Search and Seizure* §5.1(c) at 24 (citing cases)); petitioner acknowledged that he was operating a business enterprise, and he was unable to produce a license.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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March 25, 1998

No. 97-501

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

RANDALL RICCI,

Petitioner,

v.

VILLAGE OF ARLINGTON HEIGHTS
A MUNICIPAL CORPORATION,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

At issue in this case is whether a municipality may, consistent with the Fourth Amendment, require its police officers to make full custodial arrests for violations of fine-only ordinances that do not involve a breach of the peace. Fewer than ten states would permit respondent's mandatory arrest policy and no municipality in the nation aside from respondent appears to have been adopted such a policy.

Respondent does not seek to defend the mandatory nature of its arrest policy. Instead, respondent boldly urges that a holding for petitioner would mean that police will never in any circumstances be able to make a full custodial arrest for violation of a fine-only offense. This is incorrect. We do not dispute that a peace officer may make a

warrantless arrest for a fine-only infraction in appropriate circumstances; our complaint is with respondent's policy that mandates full custodial arrests for fine-only infractions that involve neither a breach of the peace nor a need to assure presence at trial.

Respondent is unable to provide any sensible justification for its mandatory arrest policy. There is neither authority nor empirical data to support respondent's extravagant claim that its full custodial arrest policy increases the number of arrestees who appear for trial. This hypothesis was rejected by the American Law Institute in its Model Code of Pre-Arraignment Procedure. It also is contrary to the practice in the City of Chicago, the municipality which respondent uses as an example of a city which would suffer extraordinary harm if police officers are not granted unrestricted arrest powers for fine-only violations: Chicago expressly discourages its police officers from making full custodial arrests for fine-only infractions that do not involve "any act which caused or threatens injury or harm to any person, or loss or damage to any property." Chicago Police Department General Order 87-9, reproduced in the Addendum, *infra*.

Acceptance of respondent's view that arrests for fine-only infractions may be based on probable cause without any exigency would eliminate all common-law limitations on warrantless arrests in non-felony cases, thereby resurrecting the general warrants prohibited by the Fourth Amendment.

In contrast to respondent's mandatory arrest policy, the police rules of the City of Chicago (reproduced in the Addendum *infra*) prohibit mandatory arrests in fine-only ordinance violation cases and set out clear and unambiguous guidelines for when full custodial arrests may be made for violation of fine-only violations. Local municipalities should remain free to experiment with innovative custodial arrest policies, but the Fourth Amendment prohibits the mandatory

custodial arrest policy at issue in this case.

I. Respondent's Business License Ordinance Is a Revenue Generating Device Unrelated to Public Safety

Respondent vastly overstates the scope of its business license ordinance, describing it as a device to "ensure the safety of business premises and to prevent fraud and abuse." (Resp.Br. 13.) But nothing in the ordinance (App. 15-16) regulates the manner in which any business is conducted. The focus of the ordinance is on the fee required for a license, which is determined by the "square footage including retail areas and indoor storage areas" used by the business. (App. 16.) Although the ordinance requires businesses to comply with the municipality's "use and occupancy" standards, (Appendix 15), these standards apply to any business irrespective of issuance of a business license.

Petitioner's wife paid the one hundred dollar fee and obtained a business license while petitioner was in custody. (Pet.App. 3.) The ease with which petitioner obtained the license is strong evidence of the lack of control respondent exercises over local businesses who apply for a license.

Further evidence that qualifying for a business license is a mere formality is that the ordinance violation charge against petitioner was dismissed without the imposition of any sanction at the first court appearance. (App. 3.) Such dismissals are routine and had been expected by the arresting officers.[1] (App. 73-74.)

The government, in its amicus brief, asks the Court to disregard the civil nature of the ordinance for which

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1. There is no support in the record for respondent's claim that petitioner believed that he was facing a "substantial fine." (Resp.Br. 9.)

petitioner was arrested.[2] (Gov't Br. 19 n.15.) The actual nature of the violation for which petitioner was arrested is a "predicate to an intelligent resolution" of the question presented, and therefore "fairly included therein." Supreme Court Rule 14.1(a); *Ohio v. Robinette*, 117 S.Ct. 417, 420 (1996) quoting *Vance v. Terrazas*, 444 U.S. 252, 258-259, n. 5 (1980)). Determination of the reasonableness of respondent's mandatory arrest policy requires consideration of the civil nature of respondent's business license ordinance.

The civil nature of respondent's business license ordinance supports the view of amicus Institute for Justice that "[d]isallowing arrests for violations of fine-only licensing ordinances would not in any way affect the ability of the government to enforce health and safety laws." (Brief of Institute of Justice 10 n.8.)

Petitioner does not challenge a municipality's power to require licenses of local businesses. Nor do we question a municipality's power to adopt policies to encourage compliance with its ordinance. Our complaint is with respondent's choice of full custodial arrests as the instrument of compliance. Respondent's policy to require arrests regardless of circumstances and independent of need is contrary to the core

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2. The government mistakenly reads the first question presented ("Does the reasonableness clause of the Fourth Amendment incorporate the common law rule prohibiting warrantless arrests in misdemeanor cases that do not involve a breach of the peace?") as a concession that petitioner was arrested for a misdemeanor offense. (Gov't Br. 19 n.15.) Petitioner has consistently referred to the ordinance as a "fine-only business license ordinance." Neither in this Court nor in the court of appeals has petitioner characterized the ordinance as a misdemeanor.

values of the Fourth Amendment.

II. Respondent Is Unable to Provide any Sensible Justification for Its Mandatory Arrest Policy

Respondent offers two justifications for its mandatory arrest policy. Neither rationale justifies the complete rejection of all common law limitations on warrantless arrests in non-felony cases.

First, without any citation of authority and without any empirical data, respondent asserts that permitting its officers to issue citations for fine-only infractions that do not involve any breach of the peace would "greatly increase the numbers of suspects who do not appear for trial." (Resp.Br. 16.) Respondent's extravagant claims about the need to make arrests in all fine-only cases was rejected by the American Law Institute in its comprehensive study of pre-arraignment procedure. ALI Model Code of Pre-Arraignment Procedure, §§120.1, 120.2. It also is belied by the adoption of citation systems in many jurisdictions, including respondent's neighbor, the City of Chicago. As we explain *infra* at 12-15, Chicago expressly discourages its police officers from making full custodial arrests for fine-only infractions that do not involve "any act which caused or threatens injury or harm to any person, or loss or damage to any property." Chicago Police Department General Order 87-9, reproduced in the Addendum, *infra*.

Second, again without any empirical data, respondent asserts that requiring full custodial arrests for violation of its business license ordinance is part of its "order maintenance" philosophy. The essence of this controversial theory, as explained by two of its leading proponents, is that "disorderly behavior . . . can threaten the social order by creating fear and criminogenic conditions." George Kelling and Catherine M. Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* 15 (1996). Operating a legitimate business from an office does not fall into this spectrum of "disorder." Moreover, a mandatory

arrest policy is the antithesis of the "order maintenance" approach.

The careful exercise of police discretion — rather than a mandatory arrest policy — is one of the keystones of the "order maintenance" movement: as stated by Kelling and Coles, "developing strong guidelines that codify appropriate measures of police discretion is an essential ingredient to any attempt to restore order." *Fixing Broken Windows* at 193.

Recent events provide ample examples of the dangers of unnecessary use of the arrest power that is part of the rule urged by respondent. Full custodial arrests for jaywalking often result in claims of the use of excessive force and give rise to citizen resentment and police excesses.[3] While it might be argued that the discretion to make jaywalking

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3. See, e.g., "City Council Worried About Lawsuits Against Police," Columbus Dispatch, January 29, 1998, 1998 WL 5688892 (reporting settlement of lawsuit arising out of a 1995 jaywalking arrest); "City to Pay $39,000 in Jaywalking Lawsuit," Columbus Dispatch, January 24, 1998, 1998 WL 5688520 (reporting settlement of lawsuit arising out of 1994 jaywalking arrest); "Donald W. Hunter Says He Just Wanted Apology," Portland Oregonian, July 30, 1993, 1993 WL 6927022 (reporting jury verdict in favor of plaintiff on jaywalking arrest claim); "The Sweetness and the Sorrow of D.C.'s Rules of the Road; Passers-by Become Indignant Over a Jaywalker's Arrest," Washington Post, December 9, 1988, 1988 WL 2013482; "Harrowing D.C. Jaywalking Arrest Described," Washington Post, August 29, 1990, 1990 WL 2112722; "Rapper Files Brutality Suit Over Jaywalking Ticket Dispute," Oakland Tribune, November 13, 1991, 1991 WL 8230763 (suit subsequently settled for $40,00); "Doctor Says D.C. Police Abused Him; Mistreatment Alleged in Jaywalking Arrest," Washington Post, March 23, 1991, 1991 WL 2149471.

arrests is essential to an "order maintenance" approach, this argument has no place in this case, where the police knew for two days before making any arrest that petitioner was operating a business without a license and were required, by respondent's policy, to make a full custodial arrest regardless of need.

Paradoxically, and perhaps unintentionally, respondent offers a persuasive argument against its mandatory arrest policy. As respondent states, police officers who have the discretion to issue a citation for a fine-only offense are likely to do so unless there is some exigency (Resp.Br. 23) because police officers "are likely to avoid arresting individuals for less serious offenses." (Resp.Br. 30.) Respondent's mandatory arrest policy, however, removes this discretion. Instead of acting as a "necessary check" (Resp.Br. 36), respondent's mandatory arrest policy requires full custodial arrests, even when — as in this case — it is perfectly clear to the arresting officers that the "offender" is operating a lawful business and will promptly comply with a licensing revenue ordinance. The lack of discretion in respondent's policy renders it constitutionally unreasonable.

III. The Arrest Policy Cannot Be Justified as a Minor Intrusion

Respondent seeks to support its mandatory arrest policy by attempting to minimize the intrusiveness of the arrest. (Resp.Br. 10.) Contrary to respondent's position, there is wide agreement with the conclusions of the American Law Institute that:

> Being arrested and held by the police, even if for a few hours is, for most persons, awesome and frightening. Unlike other occasions, on which one may be authoritatively required to be somewhere or do something, an arrest abruptly subjects a person to constraint and removes him to unfamiliar and threatening surroundings. Moreover, this exercise of control over the person depends not just on his willingness to comply with an impersonal directive, such as a summons

> or subpoena, but on an order which a policeman issues on the spot and stands ready then and there to back up with force. The security of the individual requires that so abrupt and intrusive an authority be granted to public officials only on a guarded basis.

ALI Model Code of Pre-Arraignment Procedure (1975), 290-91.

The government correctly points out that even a "short custodial arrest" is a seizure under the Fourth Amendment. (Gov't.Br. 24.) Respondent's attempt to justify its mandatory arrest policy as a minor intrusion must be rejected.

IV. Respondent's Arrest Policy Resurrects the General Warrants Prohibited by the Fourth Amendment

Respondent correctly states that at common law, warrantless arrests for misdemeanors were "made not so much for the purpose of bringing the offender to justice as in order to preserve the peace." (Resp.Br. 39.) Absent a breach of the peace, arrests for misdemeanors were made pursuant to specific arrest warrants.[4]

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4. As summarized by Professor Cuddihy in what Justice O'Connor recently described in *Vernonia School District 47J v. Acton*, 515 U.S. 646, 669 (1995) (dissenting opinion) as "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken,"

> Between 1683 and 1685, the magistrates of Haverhill, Massachusetts wrote six such warrants for infractions that included laziness, theft, assault, profanity, and unlawful impregnation. Similar warrants issued elsewhere with respect to bootlegging, tumultuous speech, and non-acceptance at public worship.

W. Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, pt. 2, p. 665-66 (Ph.D. Dissertation at Claremont Graduate School).

Respondent asserts that the common law limitations on arrests in non-felony cases are an "archaic 'handicap to our modern law enforcement officers'" (Resp.Br. 40), quoting from Fisher, *Laws of Arrest* 128 (1967), and argues that the Court should disregard all common law limitations on warrantless arrests in non-felony cases.[5] The broad rule urged by respondent would resurrect the wholesale arrests which accompanied execution of the general search warrants and writs of assistance in colonial times.

General warrants "allowed the bearer to search and arrest as he pleased."[6] Execution of the general warrant at issue in *Leach v. Three of the King's Messengers*, 19 How.St.Tr. 1001 (1765) resulted in the arrest of Leach, his "fourteen journeymen and servants," George Kearsley, his

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5. As part of its argument, respondent contends that the Court may not consider the warrant clause of the Fourth Amendment because petitioner "waived" this issue in the Court of Appeals. (Resp.Br. 23.) Respondent, however, cannot now rely on any waiver argument because it did not, as required by Rule 15.2 of this Court, assert this claim in its brief in opposition to the petition for writ of certiorari. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985). Moreover, the "waiver" holding of the Court of Appeals is unsupportable: "waiver" does not apply to particular legal theories that may be advanced in support of an issue that is properly before the court. *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991). The Seventh Circuit upheld respondent's mandatory arrest policy in part because, in its view, "a neutral magistrate following Illinois law would surely have issued a warrant in this case." (Pet.App. 8.) In light of this holding, the waiver language of the court below (Pet.App. 8 n.1) is not entitled to any weight.

6. W. Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, pt. 1, p. 269.

family, and "so many of Kearsley's employees — even his aged father — that he was compelled to entrust his business to an errand boy."[7]

Blackstone, whom respondent correctly describes as having "unparalleled" stature among the colonists (Resp.Br. 43), roundly condemned general warrants of arrest:

> A *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion. And a warrant to apprehend all persons guilty of a crime therein specified, is no legal warrant: for the point, upon which its authority rests, is a fact to be decided on a subsequent trial; namely, whether the person apprehended thereupon be really guilty or not.

4 *Blackstone's Commentaries* *288.

The government, in its amicus brief, recognizes that the vast majority of states retain some restrictions on warrantless arrests in non-felony cases. These restrictions, as the government concedes, include the "in the presence of" requirement, (Gov't Br. 8-9) as well as various statutory codifications of a "breach of the peace" or exigent circumstances limitation. (Gov't Br. 9.) In our view, these restrictions — which are found in most federal statutes (Gov't

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7. W. Cuddihy, *supra*, pt. 2, p. 888-89. It was subsequently held that the messengers lacked probable cause to arrest the servants and family members "because, even if the general warrant from Lord Halifax had been valid, Leach's employees were not among the printers, publishers, or authors of the forty-fifth issue of the North Briton to whom that warrant referred." Id. at 1194.

Br. 10) and in the statutes and caselaw of all but eight states — reflect a contemporary translation of the common-law restrictions on warrantless arrests in non-felony cases.

The government argues, however, that the states are free to abolish common law restrictions on warrantless arrests in non-felony cases without adopting any comparable restrictions on police discretion. (Gov't Br. 8.) The government is unable to identify the source of this power, other than to cite to the dissenting opinion of Mr. Justice White in *Welsh v. Wisconsin*, 466 U.S. 740, 756 (1984) and to a law review article written before *Wolf v. Colorado*, 338 U.S. 25 (1949) when the Court first held that the Fourth Amendment was applicable to the states.

There is no merit in respondent's suggestion that the framers intended that the Fourth Amendment authorize "democratically elected legislators" to have the last word on the meaning of reasonableness. (Resp.Br. 28). Respondent was able to adopt its mandatory arrest policy because the Illinois legislators have sought to remove all common-law limitations on warrantless arrests in non-felony cases. This is precisely the evil addressed by the Fourth Amendment:

> The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right.

United States v. Byars, 278 U.S. 28, 33 (1927).

V. Respondent's Mandatory Arrest Policy Is the Extreme Minority Rule

Respondent is mistaken in asserting that striking down its mandatory arrest policy "would have the effect of declaring unconstitutional, in whole or part, the laws of at least 42 states." (Resp.Br. 25.)

First, only eight states — including Illinois — permit full custodial arrests without warrant in non-felony cases on the same basis as in felony cases. (Pet.Br. 13 n.15.)

Second, none of these eight states *require* full custodial arrests in fine-only ordinance cases. Respondent's mandatory arrest policy is not compelled by Illinois law.

A ruling in petitioner's favor against respondent's mandatory arrest policy would not render unconstitutional the law of any state. Any local policy that *requires* a full custodial arrest for fine-only infractions that did not involve a breach of the peace would be constitutionally suspect, but this is precisely as the framers intended.

VI. The Chicago Police Rules Demonstrate a Workable Alternative to a Mandatory Arrest Policy for Fine-Only Infractions

Respondent seeks to defend its mandatory arrest policy by enumerating several fine-only ordinance violations of the City of Chicago.[8] (Resp.Br. 20, 35.) Respondent argues that the seriousness of the conduct prohibited by these ordinances shows the need for full custodial arrests for fine-only infractions. Respondent's argument, though, misses the point of

8. Respondent has miscited two of these ordinances: soliciting for prostitution is prohibited by Section 8-8-150, rather than 8-4-130; noise pollution is prohibited by Section 11-4-1110 rather than 10-4-1110.

this case: we do not seek a *per se* rule flatly prohibiting full custodial arrests for violation of fine-only infractions. We agree that a peace officer may make a warrantless arrest for a fine-only infraction in appropriate circumstances; our complaint is with respondent's policy that mandates full custodial arrests for fine-only infractions that do not involve any breach of the peace or a need to assure presence at trial.

With perhaps two exceptions, the Chicago ordinances collected by respondent involve conduct that is punishable by imprisonment under state law. Possession of burglar tools (Resp.Br. 19-20) is a felony, 720 ILCS 5/19-2. Trespass (Resp. Br. 19) is a misdemeanor punishable by imprisonment. 720 ILCS 5/21-3. An officer who observes a person unlawfully "manipulating a telephone coin box" (Resp.Br. 20) could make an arrest for the felony of burglary. *People v. Smith*, 264 Ill.App.3d 82, 87, 637 N.E.2d 1128, 1131 (1994).

Most of the "quality of life" infractions collected by respondent (Resp.Br. 35) are also violations of state law that are punishable by imprisonment.[9] But any rule that requires a

9. Damage to public property, §8-4-120, and defacing public property, §10-8-380, are covered by the state criminal damage to property statute, which is a misdemeanor punishable by imprisonment that may be elevated to a felony. 720 ILCS 5/21-1. Soliciting for prostitution, §8-8-150, miscited as §8-4-130, is a misdemeanor punishable by imprisonment that may be elevated to a felony. 720 ILCS 5/11-15. Indecent exposure, §8-8-080, is a misdemeanor if committed with the intent to arouse or to satisfy sexual desire. 720 ILCS 5/11-9. Gambling, §8-12-010, is a potential felony. 720 ILCS 5/28-1. Drinking by minors, §8-16-05, and possession of alcohol by a minor, §8-16-060, are misdemeanors punishable by imprisonment. 235 ILCS 5/16-6. Discharge of a firearm, §8-24-01, could be a felony if done recklessly, 720 ILCS 5/24-2; possession of a firearm is generally a felony, 720 ILCS 5/24-1.

full custodial arrest for possession of spray paint or marker by a person under 18, §8-16-096, (Resp.Br. 35) would also require a full custodial arrest for skating in the street, Chicago Municipal Code §10-8-410, dropping facial tissues upon the public way, Chicago Municipal Code §7-287-170, or possessing an unregistered bicycle. Chicago Municipal Code §9-120-020. While we would expect respondent to argue that full custodial arrests for spitting, Chicago Municipal Code, §7-28-160, would enhance "the quality of life in an urban environment," (Resp.Br. 35), the same cannot be said for arrests for violation of the Chicago ordinance that prohibits matchmaking.[10]

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10. Chicago Municipal Code §8-4-340 provides as follows:

Promotion of Marriage

No person shall seek, solicit, accept, or receive, or attempt to seek, solicit, accept, or receive, any fee, charge, commission, brokerage or any other financial or other valuable consideration from another for services or pretended services in and about aiding, encouraging, interfering, or negotiating between a man and a woman for the purpose of promoting a marriage or an acquaintanceship intended to result in marriage.

No person shall advertise by display, circular, handbill, or in any newspaper, periodical, magazine, or other publication, or by another other means, to act as agent, assistant, go between, or mediator between a man and a woman, for any fee, charge, commission, brokerage, or other financial or other valuable consideration, for the purpose of promoting a marriage or an acquaintanceship intended to result in marriage.

Any person violating any provision of this section shall be subject to a fine of not less than $100.00 nor more than $200.00 for each offense.

The very Chicago ordinances that respondent cites are a clear refutation of respondent's position — while Illinois law permits Chicago to require arrests for each of these fine-only infractions, none of these ordinances is enforced by a mandatory arrest policy: the Chicago police department has expressly forbidden mandatory arrests for violation of fine-only ordinance violations.

Chicago Police Department General Order 87-9 (as amended by General Order 87-9a) sets out the municipal policy for issuance of citations, rather than custodial arrest. The policy encourages issuance of citations for fine-only violations, (General Order 87-9, II.A, Addendum *infra* at 1), and sets out clear guidelines for when a full custodial arrest should be made. (Addendum 2-4.) Moreover, contrary to respondent's fears (Resp. Br. 21), the Chicago police department has been able to define "breach of the peace" in a simple and understandable manner. Under the general order, "a breach of the peace is any act which caused or threatens injury or harm to any person, or loss of damage to any property."

The American Law Institute, in its Model Code of Pre-Arraignment Procedure, similarly proposes to limit "the authority of the officer to arrest without a warrant for a misdemeanor not committed in the officer's presence to cases where the person to be arrested will not otherwise be apprehended, or where he might cause injury or unlawful loss or damage to property." ALI Model Code of Pre-Arraignment Procedure 290 (1975).

The approach of the ALI is endorsed by the Americans for Effective Law Enforcement in their amicus submission. The AELE opposes respondent's mandatory arrest policy and supports reversal to "hasten the adoption of flexible and reasonable statutes and policies on the subject of warrantless arrests for minor offenses." (AELE Br. 11.)

Nearly all states require more than probable cause before a peace officer may make a warrantless custodial arrest for a fine-only violation.[11] These limitations on warrantless arrests respect the intentions of the framers and require rejection of respondent's mandatory arrest policy at issue in this case.

VII. Conclusion

It is therefore respectfully submitted that the decision of the Court of Appeals should be reversed and the case remanded to the district court.

April, 1998

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11. The Chicago police rules show that the government is mistaken in its argument that these limitations on the power to make warrantless arrests raise "problems of practical implementation by officers on the street." (Gov't Br. 25.)

ADDENDUM

Chicago Police Department
General Order 87-9
(as amended by General Order 87-9a)

* * *

I. PURPOSE

This order:

A. continues use of the Ordinance Complaint form by Department members as an alternative to custodial arrests for certain classes of offenses.

B. sets forth policy and provides procedural guidelines for the issuance and control of Ordinance Complaint forms and related reports and documents.

II. GENERAL POLICY

A. Commanding officers will encourage members of their command to use the Ordinance Complaint in lieu of a physical arrest and detention in accordance with the provisions of this order.

B. With the exception of the restrictions set forth in Item III-C, an Ordinance Complaint form my be issued to any person 17 years of age or older who violates:

1. an ordinance of the City of Chicago which is punishable by fine only.

2. a petty offense or business offense as defined in the Illinois Revised Statutes for which a sentence of a fine only is provided.

3. an ordinance of the Chicago Park District which is punishable by fine only. (NOTE: The words "Park District" will be printed above the Municipal Code Box and the word "Municipal" will be lined out).

III. ENFORCEMENT POLICY

A.General Information

Ordinance Complaint forms may be used to enforce a variety of statutes and ordinances. However, the enforcement of certain laws (.e.g., building codes, weights and measures, etc.) require specific technical and/or legal knowledge and is therefore the primary responsibility of other City departments. Officers will assist these departments upon request. Enforcement action will be taken, however, on violations other than those traditionally enforced by the police when failure to do so would result in a breach of the peace or loss of pertinent evidence.

Note: For the purposes of this order, a breach of the peace is any act which caused or threatens injury or harm to any person, or loss of damage to any property.

B.Criteria for Issuance

An Ordinance Complaint form may be issued when

1. the citing officer is the complainant.
2. one citizen is the complainant against another
3. two or more citizens wish to sign cross-complaints against each other.

C.Restrictions

An Ordinance Complaint form will NOT be issued when

1. the charge involves a violation of a law relating to firearms.
2. the violator exhibits behavior which requires an officer to exert physical force to effect the arrest.
3. the violator requires medical attention, or is otherwise unable to care for his own safety or well being.

   a. After the violator receives medical attention, an Ordinance Complaint form may be issued, if all other considerations permit its use.

   b. Intoxicated persons who are unable to care for their own safety will not be issued Ordinance Complaint forms in the field, but will instead be processed in accordance with. the existing Department directive entitled "Handling the Public Inebriate."

4. the violator cannot or will not produce satisfactory evidence of identity.

   a. Satisfactory evidence of identity in defined as the amount of proof required to reasonably assure an officer that the violator is who he claim to be, taking into consideration the nature of the identification presented and the circumstances of the offense involved.

   b. If the violator cannot produce satisfactory evidence of identity, officers will attempt to verify any offered identification by independent means (e.g., telephone) if it is practicable to do so.

5. there is a reasonable, likelihood that the offense will continue or recur, or that life or property will be endangered if the violator is not arrested and removed from the scene of the occurrence
6. the prosecution of the offense in question would be jeopardized by a failure to make a physical arrest.
7. there is a reasonable likelihood that the violator will fail to appear in court. The following factors could provide reason to believe the violator would be unlikely to appear if released upon issuance of an Ordinance Complaint focus

a. The violator attempted to evade arrest.

b. The violator has failed to appear in court an previous occasions.

8. there is information available indicating that a warrant my be outstanding against the violator. In such situations a name check should be made before the Ordinance Complaint is issued.

9. the violator refuses to sign the Ordinance Complaint form to acknowledge receipt of it. The violator will be advised that his signature an the form is required as an acknowledgement that it has been received; it is not an admission of guilt.

NOTE: It the violator being cited refuses to sign the Ordinance Complaint form, normal arrest procedures will then be followed. If the form has been completed and the violator being cited subsequently refuse to sign, the form must be canceled according to Item IV-H of this directive.

* * *

(8)

No. 97-501

In the Supreme Court of the United States

OCTOBER TERM, 1997

RANDALL RICCI, PETITIONER

v.

VILLAGE OF ARLINGTON HEIGHTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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42 pp

QUESTIONS PRESENTED

1. Whether the reasonableness clause of the Fourth Amendment prohibits warrantless arrests for misdemeanors that do not involve a breach of the peace.

2. Whether a municipality may, consistent with the Fourth Amendment, require its police officers to make full custodial arrests for an alleged violation of a license ordinance punishable only by fine in order to ensure compliance with the ordinance.

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INTEREST OF THE UNITED STATES

This case presents two issues under the Fourth Amendment's reasonableness clause: whether police officers may make warrantless arrests for misdemeanors that do not involve breaches of the peace, and whether a police department may establish a policy requiring full custodial arrests for alleged violations of license ordinances punishable only by a fine. Federal law enforcement officers are authorized by statute to make warrantless arrests for misdemeanors committed in their presence, without any limitation to violations involving breaches of the peace or to violations punishable by more than a fine. See, *e.g.*, 18 U.S.C. 3052, 3053. In addition, the United States frequently prosecutes cases based on evidence that comes to

light as the result of arrests by state or local authorities enforcing their own laws, under their own policies. The United States therefore has a significant interest in the resolution of this case.

STATEMENT

1. Illinois law authorizes municipalities, like respondent, to "pass all ordinances and make all rules and regulations proper or necessary to carry into effect the powers granted to municipalities, with such fines or penalties as may be deemed proper." 65 Ill. Comp. Stat. Ann. § 5/1-2-1 (West 1996). Municipalities may also declare violations of their ordinances to be misdemeanors punishable by up to six months in the penitentiary. *Id.* § 5/1-2-1.1. Failure to pay fines or penalties can also result in imprisonment of up to six months. *Id.* § 5/1-2-1. The municipality may prosecute violations of its penal ordinances as criminal offenses. *Id.* § 5/1-2-1.1. Illinois law further authorizes peace officers to arrest persons if the officers have "reasonable grounds to believe that the person is committing or has committed an offense." 725 Ill. Comp. Stat. Ann. § 5/107-2 (West 1992). The term "offense" includes violations of municipal ordinances. *People* v. *Edge*, 94 N.E.2d 359, 363 (Ill. 1950).

The Village of Arlington Heights generally requires businesses operating within its jurisdiction to be licensed. Village of Arlington Heights, Ill., Code of Ordinances (Ordn.) §§ 14-3001, 14-3002 (1994) (see J.A. 77-78). The Village declares it "unlawful for any person to conduct, engage in, maintain, operate, carry on or manage a business * * * without first having obtained a license for such business." Ordn. § 9-201. Violators are subject to a fine of up to $500 for each offense. *Ibid.* A separate offense occurs each day during which the business operates without a license. *Ibid.* The purpose of the license requirement is so the Village "can regulate the businesses for the safety and welfare of the community." J.A. 33.

2. Petitioner Randall Ricci owns and operates Rudeway Enterprises, a telemarketing business. Pet. App. 2, 12. Rudeway sells advertising and conducts fundraising for a labor union, the Combined Counties Police Associations. *Id.* at 2. After receiving complaints from citizens who were targets of Rudeway's solicitations, the Arlington Heights police department determined that petitioner was operating his telemarketing business without a license. *Ibid.*; see Ordn. §§ 9-201, 14-3001, 14-3002. The police also uncovered an outstanding arrest warrant for one of petitioner's employees. Pet. App. 2.

Detectives went to petitioner's place of business and arrested the employee pursuant to the warrant. Pet. App. 2. At that time, petitioner admitted to the detectives that he was operating without a business license. *Ibid.* Pursuant to police department policy, petitioner was placed under arrest and taken to the police station. *Ibid.* Petitioner was detained for approximately one hour while officers processed his arrest sheet, the Local Ordinance Complaint, and bond. *Id.* at 2-3. While petitioner was at the police station, his wife obtained the required business license for Rudeway. The charges against petitioner were later dismissed. *Id.* at 3.

3. Petitioner filed suit under 42 U.S.C. 1983 against the Village and the police officers who arrested him. J.A. 3-5. The complaint charged that the officers engaged in an unconstitutional search of the business premises, arrested petitioner without probable cause, and effected an unconstitutional seizure by arresting him for a fine-only offense. J.A. 4-5. Despite "the absence of a compensable injury," the district court denied summary judgment on petitioner's search claim because of a disputed question of fact. Pet. App. 14-15. The district court granted sum-

mary judgment for the police officers on the unlawful arrest claim. The court found that the officers had probable cause to arrest petitioner because "[t]he officers observed Mr. Ricci committing th[e] unlawful act" of "operating Rudeway Enterprises without a business license." *Id.* at 16. Finally, the district court rejected petitioner's contention that the Village policy requiring arrests for violations of the business licensing ordinance violates the Fourth Amendment, holding that the arrest was "reasonable" because the crime had been committed in the officers' presence. *Id.* at 18.[1]

4. The court of appeals affirmed. The court held that the arrest was permissible because the officers had probable cause and the authority to arrest under state law. Pet. App. 4. The court of appeals indicated that, because the arrest was supported by probable cause, this is "not one of those extraordinary cases that require us to conduct a balancing analysis." *Id.* at 8. The court of appeals nonetheless noted that the arrest would satisfy a balancing of the relevant factors because of (i) the prolonged duration of petitioner's violation of the ordinance, which subjected him to "a potential fine of tens of thousands of dollars," and (ii) the brief (one hour) period of detention by the police. *Id.* at 7. "Further," the court of appeals concluded, "a neutral magistrate following Illinois law would surely have issued a warrant in this case." *Id.* at 8 n.1.[2]

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[1] Petitioner did not appeal the dismissal of his unlawful arrest claim, and the parties subsequently settled the search claim. Pet. App. 3. Neither of those issues was presented in the petition for certiorari.

[2] The court of appeals also rejected petitioner's effort to invoke the Warrant Clause of the Fourth Amendment. The court noted that petitioner had waived that claim, and that petitioner "conceded at oral argument that, had a warrant been issued in this case, the arrest would have been reasonable under the Fourth Amendment." Pet. App. 8 & n.1; see also *id.* at 18 n.4.

SUMMARY OF ARGUMENT

Petitioner's arrest for his violation of municipal law satisfied the requirements of the Fourth Amendment. The arrest was supported by probable cause to believe that petitioner violated the local law; indeed, he admitted his violation at the time of arrest. Because probable cause existed and the seizure was not effected in an extraordinary or unusual manner, the arrest was reasonable within the meaning of the Fourth Amendment.

1. There is no basis for concluding that the Fourth Amendment permits a warrantless arrest for a misdemeanor only if the violation involves a breach of the peace. The common law expressly recognized that the arrest authority of police could be expanded by statute to include arrests like the one at issue in this case, and the longstanding practice of the federal government and every State confirms that understanding. Moreover, the phrase "breach of the peace" itself lacked an established meaning at common law, such that, even if it were incorporated into the Fourth Amendment, it would not restrict arrests in the manner advocated by petitioner. Indeed, this Court has recognized that the congressional immunity from arrest for a "breach of the peace" found in Article I, Section 6 of the Constitution embraces all violations of the criminal law. Finally, the reasonableness of an arrest under the Fourth Amendment should not turn on malleable and diverse legislative classifications of crimes as misdemeanors or felonies, or on variable judicial definitions of "breach of the peace."

2. The fact that the ordinance at issue is punishable only by a fine does not mean that the Fourth Amendment bars a custodial arrest. The common law did not foreclose

arrests for fines, and established practice permits them. Furthermore, the propriety of an officer's decision to arrest based on probable cause—and his potential liability for money damages—should not vary based on the punishment that ultimately ensues weeks, months, or years later. And there is no basis for concluding that a jurisdiction's decision to penalize a violation by a fine (rather than imprisonment) means that it is less worthy of effective enforcement measures. Where probable cause exists, a jurisdiction's decision to enforce criminal violations through a custodial arrest is not constitutionally suspect simply because a less intrusive enforcement method may arguably be available.

ARGUMENT

I. WARRANTLESS MISDEMEANOR ARRESTS BASED ON PROBABLE CAUSE ARE REASONABLE UNDER THE FOURTH AMENDMENT REGARDLESS OF WHETHER THE OFFENSE CONSTITUTES A "BREACH OF THE PEACE"

The Fourth Amendment, made applicable to the States through the Fourteenth Amendment, *Payton* v. *New York*, 445 U.S. 573, 576 (1980), provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. Outside the home, the Fourth Amendment does not require a warrant in order to justify an arrest based on probable cause. *Payton*, 445 U.S. at 590-591; *Gerstein* v. *Pugh*, 420 U.S. 103, 113 (1975). Rather, a police officer's "on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Gerstein*, 420 U.S. at 113-114. There is no exception to that rule for misdemeanors not involving a breach of peace.

A. No Source Of Law Supports Imposing On The Fourth Amendment A "Breach Of The Peace" Requirement For Misdemeanor Arrests

The common law rule for warrantless misdemeanor arrests "[was] sometimes expressed" as limited to "when a breach of the peace has been committed in [the officer's] presence or when there is reasonable ground for supposing that a breach of the peace is about to be committed or renewed in his presence." *Carroll* v. *United States*, 267 U.S. 132, 157 (1925) (quoting 9 *Halsbury's Laws of England* (*Halsbury*) pt. III, § 612, at 299 (1st ed. 1909)). But that statement of the common law does not suggest that a parallel rule should exist under the Fourth Amendment. The common law itself, this Court's cases, and a pattern of arrest authorization statutes make clear that Congress and the States may expand upon the common law arrest authority of law enforcement officers.

1. The common law specifically recognized that an officer's arrest authority could be expanded by statute. 9 *Halsbury* § 613, at 300-301 & nn. d, e, 303 n.f; 10 *Halsbury's Laws of England* § 632, at 342 (3d ed. 1955) ("An arrest without a warrant may be under a power conferred by common law or by statute."). Thus, under Section 18 of the Pedlar's Act, a police officer could arrest a pedlar who "refuses to show his certificate or has no certificate." 9 *Halsbury*, at § 613, at 302 n.e. Similarly, under Section 6

of the Hawkers Act, an "officer of the peace [could] arrest a person found committing an offence against that section (hawking without licence etc.)." 9 *Halsbury*, at § 613, at 302 n.e.

Accordingly, "it is generally recognized today that the common law authority to arrest without a warrant in misdemeanor cases may be enlarged by statute." *Welsh* v. *Wisconsin*, 466 U.S. 740, 756 (1984) (White, J., dissenting) (internal quotation marks omitted); H. Wilgus, *Arrest Without A Warrant*, 22 Mich. L. Rev. 541, 550 (1923-1924) ("The states may, by statute, enlarge the common law right to arrest without a warrant, and have quite generally done so or authorized municipalities to do so, as for example, an officer may be authorized by statute or ordinance to arrest without a warrant for various misdemeanors and violations of ordinances, other than breaches of the peace, if committed in his presence.") (citing cases), 705-706 (footnotes omitted).[3]

2. This Court's descriptions of the common law rule for misdemeanor arrests, moreover, have generally omitted the breach of the peace limitation and have focused, instead, on the requirement that the misdemeanor be committed in the officer's presence. See, *e.g.*, *Payton*, 445 U.S. at 590 n.30 ("The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence."); *United States* v. *Watson*, 423 U.S. 411, 418 (1976) (same); *Johnson* v. *United States*, 333 U.S. 10, 15 (1948); *Carroll*,

[3] See also *Oleson* v. *Pincock*, 251 P. 23, 25 (Utah 1926); *Burroughs* v. *Eastman*, 59 N.W. 817, 819-820 (Mich. 1894); *White* v. *Kent*, 11 Ohio St. 550, 554 (1860); *Conrad* v. *Lengel*, 144 N.E. 278, 278 (Ohio 1924) (peddling without city license); 10 *Halsbury*, §§ 641, 642, at 347-351 (discussing statutory powers of police to arrest without a warrant).

267 U.S. at 156 ("The usual rule is that a police officer * * * may only arrest without a warrant one guilty of a misdemeanor if committed in his presence."); *John Bad Elk* v. *United States*, 177 U.S. 529, 534 (1900) ("[A]n officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence."); *Kurtz* v. *Moffitt*, 115 U.S. 487, 498-499 (1885); *Davis* v. *United States*, 328 U.S. 582, 614 (1946) (Frankfurter, J., dissenting).[4]

The common law "breach of the peace" limitation that petitioner seeks to incorporate into the Fourth Amendment thus has not been treated as an essential aspect of the common law arrest power. See also 4 W. Blackstone, *Commentaries on the Laws of England* 289 (1769). Likewise, most lower courts that have addressed the issue have held that the Fourth Amendment does not bar warrantless misdemeanor arrests, regardless of whether the offense constitutes a breach of the peace or is punishable only by fine. See *Higbee* v. *City of San Diego*, 911 F.2d 377, 379-380 (9th Cir. 1990); *United States* v. *Trigg*, 878 F.2d 1037, 1041 (7th Cir. 1989); *Fisher* v. *Washington Metro. Area Transit Auth.*, 690 F.2d 1133, 1139 & n.6 (4th Cir. 1982); *Street* v. *Surdyka*, 492 F.2d 368, 370-373 (4th Cir. 1974).[5]

3. The breach of the peace limitation on misdemeanor arrests also finds no support in the legislation of Congress

[4] The requirement that the misdemeanor be committed in the officer's presence is not at issue in this case. Cf. *Welsh*, 466 U.S. at 756 (White, J., dissenting) ("But the requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment."); 3 W. LaFave, *Search and Seizure* § 5.1(b), at 21 (3d ed. 1996).

[5] But see *Staker* v. *United States*, 5 F.2d 312, 314 (6th Cir. 1925); *Barnett* v. *United States*, 525 A.2d 197, 199-200 (D.C. App. 1987) (civil violation); *Thomas* v. *State*, 614 So.2d 468, 470-471 (Fla. 1993) (civil violation).

or the States. While Congress has generally retained the "in the presence" requirement for misdemeanor arrests by federal law enforcement officers, no federal statute confines misdemeanor arrests to breaches of the peace. See, *e.g.*, 18 U.S.C. 3052 (FBI agents authorized to "make arrests without warrant for any offense against the United States committed in their presence"), 3053 (same, for U.S. marshals and deputies), 3056(c)(1)(C) (same, for Secret Service).[6] "Because there is a strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable,'" *Watson*, 423 U.S. at 416 (quotation marks omitted), Congress's consistent omission of a breach of the peace requirement for warrantless misdemeanor arrests counsels strongly against

[6] See also 18 U.S.C. 3061(a)(2) (postal inspectors may "make arrests without warrant for offenses against the United States committed in their presence"), 3063(a)(3) (same for Environmental Protection Agency officers); 19 U.S.C. 1589a(3) (same for customs officers); 21 U.S.C. 878(a)(3) (same for Drug Enforcement Administration officers); 25 U.S.C. 2803(3)(A) (Bureau of Indian Affairs officers may "make an arrest without a warrant for an offense committed in Indian country if * * * the offense is committed in the presence of the employee"); 28 U.S.C. 566(d) (in protecting courts and federal judicial officers, U.S. marshals may "make arrests without warrant for any offense against the United States committed in his or her presence"); see generally U.S. General Accounting Office, *Federal Law Enforcement: Investigative Authority and Personnel at 32 Organizations* App. II & III (GAO/GGD-97-93, Sept. 1996); U.S. General Accounting Office, *Federal Law Enforcement: Investigative Authority and Personnel at 13 Agencies* App. I & II (GAO/GGD-96-154, Sept. 1996). Congress has also authorized certain law enforcement officers to effect warrantless arrests for specific offenses, some of which are not felonies. See, *e.g.*, 16 U.S.C. 668b(a), 668dd(f), 670j(b)(1), 690e(a), 706, 727(a), 742j-1(d), 831c-3(b), 916g, 959(d)(1), 971f(a)(2), 972g(d), 1172, 1338(b), 1377(d)(1), 1540(e)(3), 3375(b), 5506(c)(1)(A); 21 U.S.C. 372; 22 U.S.C. 1978(f)(4)(A); 33 U.S.C. 446, 452, 1321(m)(1)(B); 45 U.S.C. 413; 50 U.S.C. App. 2411(a).

incorporating such a limitation into the Fourth Amendment.

All fifty States and the District of Columbia, likewise, authorize at least some (if not all) of their law enforcement officers to execute warrantless misdemeanor arrests in the absence of a breach of the peace. See, *e.g.*, Ala. Code § 15-10-3(a)(1) (1996) (authorizing warrantless arrests for any "public offense" committed in the presence of the officer); Alaska Stat. § 12.25.030(a)(1) (Michie 1996) (authorizing arrest without a warrant "for a crime committed * * * in the presence of the person making the arrest"); Ariz. Rev. Stat. Ann. § 13-3883 (West 1997) (authorizing arrest without a warrant when a misdemeanor has been committed in the officer's presence).[7]

The Model Code of Prearraignment Procedure similarly authorizes warrantless arrests where the officer has reasonable cause to believe that the person has committed "a misdemeanor or petty misdemeanor in the officer's presence." *Model Code of Prearraignment Procedure* § 120.1, at 13 (1975). Academic scholars have also long acknowledged the propriety in this country of warrantless arrests for misdemeanors even if they do not amount to a breach of the peace.[8]

[7] We have collected representative state statutes in an appendix to this brief. App., *infra*, 1a-5a. See also W. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 Mo. L. Rev. 771, 847 (1993).

[8] See, *e.g.*, H. Voorhees, *The Law of Arrest in Civil and Criminal Actions* § 131, at 78-79 (1904) ("[B]y authority of statute, city charter, or ordinance, [an officer] may arrest without a warrant, one who, within his jurisdiction, commits a misdemeanor other than a breach of the peace, as, for example, one who is violating a city ordinance, without breaking the peace.") (footnotes omitted), § 146, at 85; Wilgus, *supra*, at 541, 550; 3 W. LaFave, *supra*, § 5.1(b), at 13-22.

4. In some contexts, common law limitations that take root in this country may suggest that a similar constraint applies under the Fourth Amendment. See *Wilson* v. *Arkansas*, 514 U.S. 927, 933 (1995) (common law "knock and announce" principle incorporated into Fourth Amendment in part because the rule "was woven quickly into the fabric of early American law"). But this Court "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Tennessee* v. *Garner*, 471 U.S. 1, 13 (1985) (quoting *Payton*, 445 U.S. at 591 n.33). This is especially true when the Court is analyzing the appropriate objects or targets of a search or seizure, rather than defining what constitutes a "search" or "seizure" in the first instance. See *California* v. *Hodari D.*, 499 U.S. 621, 627 n.3 (1991); see also *Payton*, 445 U.S. at 600 (noting that "custom and contemporary norms necessarily play * * * a large role in the constitutional analysis" of what is "reasonable" under the Fourth Amendment); *Warden* v. *Hayden*, 387 U.S. 294, 300-310 (1967) (rejecting common-law prohibition against searches for "mere evidence").

In this context, where the common law itself acknowledged that legislatures were not bound by a breach-of-the-peace limitation, and where "the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause" for misdemeanors, *Watson*, 423 U.S. at 423, transposition of a breach of the peace limitation into the Fourth Amendment is unwarranted.

B. "Breach of the Peace" At Common Law Often Encompassed All Violations Of The Criminal Law

"Breach of the peace" had different meanings at common law. In the face of the range of meanings employed, petitioner's suggestion that a restrictive definition apply

as a matter of constitutional law is particularly unjustified.

While some definitions focused (like petitioner) on conduct that threatened violence, disorder, or disruption, the common law at other times employed "breach of the peace" to refer to all violations of the criminal law. See, *e.g.*, H. Voorhees, *The Law of Arrest in Civil and Criminal Actions* § 117, at 72 (1904) ("a breach of the public peace is the invasion of the security and protection which the law affords every citizen"); Wilgus, *supra*, at 574 (under the statute of Charles II, "it was held that every indictable offense was constructively a breach of the peace * * * [and] disobeying any act of parliament was a breach of the peace") (footnotes omitted); *City of Boerne* v. *Flores*, 117 S. Ct. 2157, 2173 (1997) (Scalia, J., concurring) (citing English cases to the effect that "[E]very breach of law is against the peace."), 2174 & n.2.[9]

Indeed, this Court has adopted the broader construction of "breach of the peace" in interpreting the legislative immunity from arrest granted Members of Congress by Article I, Section 6 of the Constitution, which in relevant part provides: "The Senators and Representatives * * * shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Atten-

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[9] See also *Akron* v. *Mingo*, 160 N.E.2d 225, 228-231 (Ohio 1959); *State ex rel. Thompson* v. *Reichman*, 188 S.W. 225, 228 ("The term 'breach of the peace' is generic and includes all violations of public peace or order, or acts tending to the disturbance thereof."), 230, on reh'g, 188 S.W. 597, 601 (Tenn. 1916) ("[W]hat can be more logical than to say that every violation of a criminal law is a breach of the peace of the state?"). The common law also recognized that the crimes constituting a breach of the peace could be expanded by statute. Wilgus, *supra*, at 575 (noting that the phrase had been expanded to include, for example, desecrating the national flag and transporting intoxicating liquor); *Reichman*, 188 S.W. at 607.

dance at the Session of their respective Houses, and in going to and returning from the same." As this Court has explained:

> [W]hen the Constitution was written the term "breach of the peace" did not mean, as it came to mean later, a misdemeanor such as disorderly conduct but had a different 18th century usage, since it derived from breaching the King's peace and thus embraced the whole range of crimes at common law.

United States v. *Brewster*, 408 U.S. 501, 521 (1972); see also *Williamson* v. *United States*, 207 U.S. 425, 444 (1908) ("Now, as all crimes are offenses against the peace, the phrase 'breach of the peace' would seem to extend to all indictable offenses, as well those which are in fact attended with force and violence, as those which are only constructive breaches of the peace of the government, inasmuch as they violate its good order."); J. Story, *Commentaries on the Constitution of the United States* § 438, at 308 (Carolina Academic Press 1987) (same).

Petitioner's argument thus attempts to imply into one provision of the Constitution an interpretation of "breach of the peace" that is quite different from the meaning the Framers ascribed to that phrase when drafting Article I. At a minimum, the established constitutional definition and other common law authority demonstrate that the meaning of "breach of the peace" was sufficiently unsettled to preclude elevating petitioner's reading of the phrase to the level of constitutional rule. See *Payton*, 445 U.S. at 598.

C. Assessing The Validity Of Warrantless Arrests Based On The Common Law Distinction Between Felonies And Misdemeanors Would Be Unworkable

Petitioner's effort to impose constitutional limits on misdemeanor arrests is predicated upon an anachronistic distinction between felonies and misdemeanors that cannot be translated into modern criminal law. At common law, felonies consisted of crimes punishable by death or forfeiture of land. See 1 J. Stephen, *A History of the Criminal Law of England* 458 (1883).[10] The term "misdemeanor" comprised all remaining crimes except treason. *E.g.*, Wilgus, *supra*, at 572.

Because of the statutory codification of criminal law in most American jurisdictions, many of the crimes considered to be misdemeanors at common law—such as assault, attempted felonies, forgery, and kidnapping—are now considered felonies. See, *e.g.*, *Garner*, 471 U.S. at 14, 20 (statutory changes in the classification of crime have "made the assumption that a 'felon' is more dangerous than a misdemeanant untenable"; distinction is "highly technical" and "arbitrary").[11] Indeed, "[i]n this country there is no generally accepted meaning of the[] terms" felony and misdemeanor "except as given by statute."

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[10] See also *Garner*, 471 U.S. at 13-14; *Kurtz*, 115 U.S. at 499; Voorhees, *supra*, § 115, at 70-71; Wilgus, *supra*, at 569.

[11] See also Wilgus, *supra*, at 573; 1 Stephen, *supra*, at 489 ("A large number of misdemeanours were created by statute at different times, but especially in the eighteenth and nineteenth centuries, which differ in no essential respect from the common crimes distinguished as felonies."); 2 Stephen, *supra*, at 189, 193 ("[S]ince the substitution of milder punishments for death, the distinction [between felonies and misdemeanors] has become unmeaning and a source of confusion, especially as many offences have been made misdemeanours by statutes, which render the offender liable to punishments as severe as those which are now usually inflicted upon persons convicted of felony.").

Wilgus, *supra*, at 570; *Carroll*, 267 U.S. at 158 ("Under our present federal statutes, [the distinction between felonies and misdemeanors] is much less important and Congress may exercise a relatively wide discretion in classing particular offenses as felonies or misdemeanors.").

Petitioner's proposed constitutional rule, if construed literally, would thus place undue weight on the vagaries of legislative classifications of crime. As a result, the same crime committed by the same defendant would constitutionally be subject to warrantless arrest in one jurisdiction and to only a summons or citation in another jurisdiction. For example, stalking by telephone or letter, or violation of a protective order in a domestic violence case (neither of which would necessarily have been considered a breach of the public peace at common law) is treated as a felony in some States and a misdemeanor in others. See U.S. Dep't of Justice, Office of Justice Programs, *Domestic Violence and Stalking: The Second Annual Report to Congress under the Violence Against Women Act* App. A (July 1997) (chronicling state legislation).[12] And the State of New Jersey classifies all of its

[12] See also U.S. Dep't of Justice, Bureau of Justice Assistance, *Regional Seminar Series on Developing and Implementing Antistalking Codes* 53-55 (Table 9) (June 1996); Institute for Law and Justice, *Domestic Violence: A Review of State Legislation Defining Police and Prosecution Duties and Powers* (*Domestic Violence*) 2, 7-10, 25 (March 1998); Institute for Law and Justice, *State Stalking Legislation: A Status Report—1997* (*State Stalking Legislation*), at 5 (Exh.1) and App. 1 & 2 (Mar. 1998).

At least 28 States and the District of Columbia, moreover, mandate or strongly encourage arrests in stalking and domestic violence cases as a matter of policy. Petitioner's proposed construction of the Fourth Amendment could imperil some of those important law enforcement policies and programs. *State Stalking Legislation*, *supra*, at 19 (Exh. 4) (documenting States that authorize arrests without a warrant for stalking); *Domestic Violence*, *supra*, at 12 ("Today all but 1 state authorizes warrantless arrests of domestic violence offenders based solely on a probable cause determination," and "[i]n 20 states and the District of Columbia police arrest is required when the officer determines that probable cause exists."), 13, 76 (48 states authorize warrantless arrests based on a probable cause determination that a protective order has been violated). The laws of thirteen States explicitly bar police from simply issuing citations or appearance tickets in lieu of a formal arrest in domestic violence cases. *Domestic Violence*, *supra*, at 16.

crimes as misdemeanors. N.J. Stat. Ann. § 2C:1-4 (West 1995). This Court should be hesitant to constitutionalize legislative labels that are often the "result[] of evolution or accident" (Wilgus, *supra*, at 568), and to adopt a rule under which "the search and seizure protections of the Fourth Amendment are so variable" (*Whren* v. *United States*, 116 S. Ct. 1769, 1775 (1996)).[13]

The misdemeanor/felony distinction between probable cause arrests would also prove difficult to apply by police officers on the street. Frequently the line between felony and misdemeanor conduct is dependent upon the offender's prior criminal history or the amount of money or of a drug at issue. See, *e.g.*, 18 U.S.C. 510 (forgery of Treasury checks under $500 is a misdemeanor); 21 U.S.C. 841, 842, 844. A police officer who witnesses the forgery of a Social Security check or an individual possessing an unknown quantity of drugs (neither of which would necessarily qualify as a breach of peace at the common law) will not know whether a warrantless arrest is permitted until after the offender is seized, the evidence collected, and

[13] These concerns equally counsel against amici ACLU's and NACDL's argument (ACLU Br. 22-28; NACDL Br. 15-17) that warrants should be required for misdemeanor arrests. The need to preempt harm to victims, prevent offenders from disappearing, confirm an offender's identity, and protect against the destruction of evidence justifies permitting arrests outside the home based on probable cause alone, regardless of whether an offense can be deemed a breach of the peace or not.

the defendant's criminal history checked. See *Berkemer* v. *McCarty*, 468 U.S. 420, 430 (1984) ("The police often are unaware when they arrest a person whether he may have committed a misdemeanor or a felony. * * * Indeed, the nature of his offense may depend upon circumstances unknowable to the police, such as whether the suspect has previously committed a similar offense or has a criminal record of some other kind.") (footnote omitted).[14]

Petitioner and his amici suggest (Pet. Br. 21-26; ACLU Br. 4, 10, 19-22; NACDL Br. 9-15) that misdemeanors that do not amount to a breach of the peace are less serious crimes for which enforcement can be relaxed at little social cost. That assessment is unfounded. The forgery of a poor, elderly person's $400 Social Security check (18 U.S.C. 495, 510) may distress and financially embarrass that victim. An officer's arrest of an individual who mutilates federal bank notes by removing the corner dollar values (18 U.S.C. 333) may expose a counterfeiting operation that would cost the taxpayers a significant amount of money. And domestic violence that does not rise to the level of a common law breach of the peace (such as where the victim of a battery cannot scream or otherwise disturb the public, see Wilgus, *supra*, § 121, at 74) may nevertheless inflict considerable suffering on the victim.

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[14] It would be possible to hold that a warrantless arrest would be permissible only if officers had knowledge of the facts that raised the misdemeanor to a felony. See *Welsh*, 466 U.S. at 746 n.6. But that approach would sacrifice the strong societal interest in law enforcement for misdemeanors that pose significant social harms in their own right and that may frequently constitute felonies because of aggravating factors that are discovered only after the arrest.

II. THE FOURTH AMENDMENT PERMITS ARRESTS BASED ON PROBABLE CAUSE FOR OFFENSES NOT PUNISHABLE BY INCARCERATION

Petitioner's alternative contention (Br. 11-13, 23 26) is that, even when the police possess probable cause, they may not effectuate an arrest if the authorized punishment for the violation is a fine. The fact that an offense is not punishable by incarceration, however, does not strip the offense of its criminal character. Nor does it diminish the governmental interest in ensuring compliance with the law and the imposition of authorized penalties.[15]

A. Fines Are A Historic Means Of Enforcing The Criminal Law

Fines have long been a recognized means of enforcing the criminal law. In 1413, persons found guilty of forging property deeds were required to "make fine and ransom at the king's pleasure." 3 Stephen, *supra*, at 181.[16] Offenses

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[15] Amici National Association of Criminal Defense Lawyers and the American Civil Liberties Union attempt to characterize the ordinance violation at issue as a civil, rather than a criminal, offense. NACDL Br. 6; ACLU Br. 1 n.2. We take no position on that issue. We note, however, that petitioner has not contested the status of the Village's business ordinance as a misdemeanor either before this Court or the court of appeals. Neither the district court nor the court of appeals addressed the status of the offense. Respondent's first question presented, moreover, presupposes that the offense is a misdemeanor. Pet. i ("Does the reasonableness clause of the Fourth Amendment incorporate the common law rule prohibiting warrantless arrests *in misdemeanor cases* that do not involve a breach of the peace?") (emphasis added).

[16] Petitioner's effort (Br. 11) to categorize ordinance offenses as civil is particularly unhelpful in this analysis both because of how closely civil and criminal cases were intertwined in the early common law and because the common law allowed for arrests to commence civil

as varied as "cutting off the ears of the king's subjects," burning carts loaded with coal, bribery in parliamentary elections, and the unlawful collection of interest were, for a period of time, punishable only by a fine. *Id.* at 189, 198, 253. Cases specifically recognized that "ordinances punishing by fine" certain types of misconduct "were *penal* laws." Wilgus, *supra*, at 551 n.60 ("[A]lthough the penalty may be a fine only * * *, there is a real crime.") (citing *County of Wayne* v. *City of Detroit*, 17 Mich. 390 (1868), and *People* v. *Controller*, 18 Mich. 445, 576 (1869)).

In the modern day, government continues to rely upon fines as an important means of punishing crime. Congress has created a number of criminal offenses for which a fine is the only authorized sanction. See, *e.g.*, 14 U.S.C. 84 (interference with aids to navigation), 15 U.S.C. 1338 (cigarette labeling and advertising); 16 U.S.C. 422d and 423f (vandalism at national monuments and military parks); 18 U.S.C. 243 (exclusion of jurors on account of race or color), 244 (discrimination against person wearing uniform of the armed forces); 18 U.S.C. 475 and 489 (imitating or reproducing U.S. obligations, securities, or coins).

Petitioner and his amici assume (Pet. Br. 7-9; ACLU Br. 19-22; NACDL Br. 9-11) that the decision to withhold incarceration as punishment for a crime diminishes the seriousness of the offense. While the type of sanction authorized is one indication of seriousness, *Welsh*, 466 U.S. at 754 n.14; see *Lewis* v. *United States*, 116 S. Ct. 2163, 2166 (1996), the sanction chosen by government can-

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actions. See, *e.g.*, 3 Stephen, *supra*, at 180-181, 241-242 ("[T]he blending of civil and criminal consequences in a single proceeding * * * was not an uncommon characteristic of our early criminal law."); *Long* v. *Ansell*, 293 U.S. 76, 83 (1934) ("When the Constitution was adopted, arrests in civil suits were still common in America."); *Williamson*, 207 U.S. at 435-440.

not be the sole, dispositive factor in evaluating the public's interest in enforcement. The selection of a punishment for a crime reflects a complicated judgment about the nature of the crime, its cost to society, the risk of recidivism, and the best means of deterring violations. See *Welsh*, 466 U.S. at 760 (White, J., dissenting). For example, many prosecutor's offices have adopted diversion programs for first-time domestic violence and drug offenders. First-time offenders are given probation and required to meet a variety of educational, employment, and counseling requirements, in lieu of incarceration. See also *Bearden* v. *Georgia*, 461 U.S. 660, 662 (1983) (discussing the Georgia First Offender's Act). It is true that incarceration remains a potential penalty in the diversion program cases. But that does not significantly distinguish the case at hand, because individuals who refuse to pay the fine for an ordinance violation (for reasons other than poverty) often can be jailed. See, *e.g.*, 65 Ill. Comp. Stat. Ann. 5/1-2-1 (West 1996); *Bearden*, 461 U.S. at 668; *Tate* v. *Short*, 401 U.S. 395, 400 (1971) ("[O]ur holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so * * * [or] when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means.").

A decision to limit the sanction for a violation to a fine thus does not translate into a lack of interest in or commitment to enforcing the law. Legislatures may "consciously chose to limit the penalties imposed on first offenders in order to increase the ease of conviction and the overall deterrent effect of the enforcement effort." *Welsh*, 466 U.S. at 763 (White, J., dissenting). Indeed, given the exploding prison population and the generally

high recidivism rates for released prisoners,[17] governments that experiment with alternatives to incarceration, such as fines, should not find their hands tied in enforcing and implementing those alternative sanctions. Nor should the Fourth Amendment categorically declare that such experimentation, as a matter of constitutional law, reflects such a diminished community interest in law enforcement that probable cause arrests are impermissible. See *Mayer* v. *City of Chicago*, 404 U.S. 189, 197 (1971) ("The practical effects of conviction of even petty offenses of the kind involved here are not to be minimized. A fine may bear as heavily on an indigent accused as forced confinement."); *Tate*, 401 U.S. at 399 (acknowledging government's "concededly valid interest in enforcing payment of fines").

B. The Fourth Amendment Permits Seizures For Offenses Punishable Only By Fine

This Court's decisions have recognized that the Fourth Amendment does not preclude seizures where the offense is not punishable by incarceration. Stops for traffic violations have long been permitted. See, *e.g.*, *Pennsylvania* v. *Mimms*, 434 U.S. 106, 107 (1977) (driving with expired license plate).[18] Recently, in *Whren* v. *United States*, 116 S. Ct. 1769 (1996), this Court unanimously rejected an effort to require more than probable cause to justify a seizure for a "civil traffic violation." *Id.* at 1771-1773. The petitioners in *Whren* argued that, in analyzing

[17] See U.S. Dep't of Justice, Bureau of Justice Statistics, *Correctional Populations in the United States 1995* 6 (Table 1.5), 37 (Table 3.6), 130 (Table 6.5) (May 1997); U.S. Dep't of Justice, Office of Justice Programs, *Recidivism of Prisoners Released in 1983* 1-3 (Apr. 1989).

[18] See also *Michigan* v. *DeFillippo*, 443 U.S. 31, 36-40 (1979); *Gustafson* v. *Florida*, 414 U.S. 260, 265 (1973); *United States* v. *Robinson*, 414 U.S. 218, 234-235 (1973).

the reasonableness of the seizure, courts should factor in the purportedly diminished governmental interest in enforcing "minor traffic infractions." *Id.* at 1776. While acknowledging "in principle" that every Fourth Amendment case entails a balancing of relevant factors, the Court held that "the result of that balancing is not in doubt where the search or seizure is based upon probable cause." *Ibid.* The officer's "probable cause to believe the law has been broken" necessarily "'outbalances' private interest in avoiding police contact." *Id.* at 1777. The Court ruled that actual balancing is reserved for those cases where probable cause is absent or the seizure is "conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests." *Id.* at 1776.[19]

To the *Whren* petitioners' objections that traffic violations are so multitudinous and inadvertently violated as to render the stops "extraordinary," the Court responded:

> [W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement.

116 S. Ct. at 1777. Here, as in *Whren*, "there is no realistic alternative to the traditional common-law rule that

[19] Such extraordinary searches or seizures include surgical intrusion (*Winston* v. *Lee*, 470 U.S. 753 (1985)), the use of deadly force (*Garner*, 471 U.S. 1), or warrantless or unannounced entries into the home (*Wilson*, 514 U.S. 927; *Welsh*, 466 U.S. at 740). Neither those activities, nor anything like them, occurred here.

probable cause justifies a search and seizure," and so "infraction itself" should remain "the ordinary measure of the lawfulness of enforcement." *Whren*, 116 S. Ct. at 1777.

The present case involves a short custodial arrest, and *Whren* involved a stop. But both qualify as seizures under the Fourth Amendment. 116 S. Ct. at 1772; *Watson*, 423 U.S. at 414-424; see also *Robbins* v. *California*, 453 U.S. 420, 450 (1981) (Stevens, J., dissenting) ("I am not familiar with any difference between custodial arrests and any other kind of arrest."), overruled, *United States* v. *Ross*, 456 U.S. 798 (1982). Furthermore, the extent of the seizure was not a factor in the *Whren* Court's analysis precisely because such balancing was deemed unnecessary for routine seizures based on probable cause. See 116 S. Ct. at 1776-1777; see also *Robbins*, 453 U.S. at 450 (Stevens, J., dissenting) ("As a matter of constitutional law, however, any person lawfully arrested for the pettiest misdemeanor may be temporarily placed in custody.") (footnote omitted). In *Welsh*, the Court held that a State's classification of an offense as noncriminal and the modest sanction imposed were relevant in assessing whether officers could make a warrantless arrest in the home. 466 U.S. at 752-754. *Whren* makes clear that, for routine seizures based on probable cause outside the home, such considerations play no part in the constitutional analysis. See also *Schmerber* v. *California*, 384 U.S. 757, 766-772 (1966).

A custodial arrest may serve valid purposes even where the ultimate penalty upon conviction is not incarceration. The police may need to preserve evidence, confirm the suspect's identity, defuse and control a situation, or abate a continuing violation. Other purposes may exist as well.[20]

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[20] For example, jurisdictions that mandate or encourage arrests of shoplifters or runaways may consider their arrest policy part of a larger law enforcement strategy designed to deter or cure petty violations before a pattern of criminality develops.

J.A. 74 (Arlington Heights effects arrests for violations of its business license ordinance because "there [are] accountability factors to make sure that people are going to come into court"). Those purposes justify the arrest even where the legislature does not deem it necessary to punish violators with incarceration.[21]

C. A Distinction In Arrest Authority Based On Punishment Poses Enforcement Difficulties

Like petitioner's effort to confine misdemeanor arrests to breaches of the peace, a constitutional rule that only allows arrests for offenses punishable by imprisonment raises problems of practical implementation by officers on the street. A number of laws make first offenses punishable by a fine or other non-incarceration penalty, but permit incarceration for subsequent offenses. See, *e.g.*, *Welsh*, 466 U.S. at 746 (first offense is a civil infrac-

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[21] See *Michigan* v. *Summers*, 452 U.S. 692, 702-703 (1981); *Higbee*, 911 F.2d at 380 ("Plaintiffs were not being punished. They were merely being taken to jail to be booked and processed in the customary manner."); *Reichman*, 188 S.W. at 230 (because it serves a distinct law enforcement purpose, arrest for violation of liquor laws permissible even though imprisonment may not be available as punishment); Wilgus, *supra*, at 543 (an arrest "is the apprehension or taking into custody of an alleged offender, in order that he may be brought into the proper court to answer for a crime.") (footnote and quotation marks omitted); W. LaFave, *Arrests: The Decision to Take a Suspect into Custody* 186-189 (1965); 4 W. Blackstone, *Commentaries on the Laws of England* 286-292 (1769); cf. *Ehrlich* v. *Giuliani*, 910 F.2d 1220, 1223 (4th Cir. 1990) ("One of the most important duties of a prosecutor pursuing a criminal proceeding is to ensure that defendants * * * are present at trial."); *Lerwill* v. *Joslin*, 712 F.2d 435, 438 (10th Cir. 1983) (arrest brings the subject before the court and subjects him to its immediate authority, without which "the initiation of a prosecution would be futile").

tion punishable by $200 fine; subsequent offenses punishable by imprisonment of up to one year); *Carroll*, 267 U.S. at 154. A police officer witnessing an offense on the street, however, has no way of knowing whether the perpetrator is a first-time offender. Failure to arrest could leave a repeat offender on the street; arrest could subject the officer to personal liability for damages. "This is a very unsatisfactory line of difference" for police officers to administer. *Carroll*, 267 U.S. at 157.

D. Legislatures Have Prevented And Can Continue To Prevent Arbitrary Law Enforcement

Adopting a constitutional rule for fine-only misdemeanors is not the only available safeguard against possible abuses. As amicus ACLU demonstrates (Br. 12-15), a number of States have taken steps to limit the authority of police to arrest for misdemeanors or fine offenses. See also Nonresident Violator Compact, Tex. Transp. Code §§ 703.001 - 703.004 (1997); *Berkemer*, 468 U.S. at 437 n.26. Similarly, the United States Park Police, in conjunction with the district courts, have developed a "collateral list" procedure under which officers may issue citations for certain misdemeanor crimes and may either require a subsequent appearance in court or allow the offender to avoid a court appearance by paying a designated fine. The Village of Arlington Heights itself has elected not to arrest for certain ordinance violations. J.A. 23-24.

Such decisions are best made locally in light of the particular policy concerns and needs for law enforcement of individual communities. Once a community has adjudged certain behavior to be criminal, the Fourth Amendment should not require police officers, who have probable cause to believe that an offense has been committed, to adopt the least restrictive or least intrusive means of enforcing the law. See *United States* v. *Sharpe*, 470 U.S. 675, 687 (1985)

("[T]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

The following state statutes describe the authority of law enforcement officers to effect warrantless arrests.

Ala. Code § 15-10-3(a)(1) (1996) (authorizing warrantless arrest for any "public offense" committed in the presence of the officer); Alaska Stat. § 12.25.030(a)(1) (Michie 1996) (authorizing arrest without a warrant "for a crime committed * * * in the presence of the person making the arrest"); Ariz. Rev. Stat. Ann. § 13-3883 (West 1997) (authorizing arrest without a warrant when a misdemeanor has been committed in the officer's presence); Ark. Code Ann. § 16-81-106(a)(2) (Michie 1997) (authorizing arrest by an officer without a warrant "where a public offense is committed in his presence"); Cal. Penal Code § 836(a)(1) (West Supp. 1998) (authorizing warrantless arrest where "the person arrested has committed a public offense in the officer's presence"); Colo. Rev. Stat. Ann. § 16-3-102(b) (West 1998) (authorizing officer to make warrantless arrest when "[a]ny crime has been or is being committed" in the officer's presence); Conn. Gen. Stat. Ann. § 54-1f(a) (West 1994) (authorizing warrantless arrests for "any offense"); Del. Code Ann. tit. 11, § 1904(a)(1) (1997) (authorizing warrantless arrest for any misdemeanor committed in the officer's presence); D.C. Code Ann. § 23-581(a)(1)(B) (1996) (authorizing warrantless arrest where officer has probable cause to believe a person has committed an offense in the officer's presence); Fla. Stat. Ann. § 321.05(1) (West 1995 & Supp. 1997) (authorizing arrests by officers without a warrant "for the violation of any state law committed in their presence"); Ga. Code § 17-4-20 (1997) (authorizing warrantless arrest by officer "for a crime * * * if the offense is committed in such officer's presence"); Haw. Rev. Stat. Ann. § 803-5(a)

(Michie 1997) (authorizing warrantless arrest "when the officer has probable cause to believe that [a] person has committed any offense"); Idaho Code § 19-603(1) (1997) (authorizing warrantless arrest by officer "for a public offense committed or attempted in his presence"); 725 Ill. Comp. Stat. Ann § 5/107-2(1)(c) (West 1992) (authorizing arrest by officer without a warrant when "[h]e has reasonable grounds to believe that the person is committing or has committed an offense"); Ind. Code Ann. § 35-33-1-1(a)(4) (Burns 1986) (authorizing warrantless arrest when the officer has probable cause to believe a person "is committing or attempting to commit a misdemeanor in the officer's presence"); Iowa Code Ann. § 804.7 (1994) (authorizing warrantless arrest "for a public offense committed or attempted in the peace officer's presence"); Kan. Stat. Ann. § 22-2401 (1996) (authorizing warrantless arrest for "[a]ny crime, except a traffic infraction or a cigarette or tobacco, infraction" committed in the officer's view); Ky. Rev. Stat. Ann. § 431.005(1)(d) (Baldwin 1997) (authorizing warrantless arrest for any offense punishable by confinement committed in the officer's presence); La. Code Crim. Proc. Ann. art. 213(3) (West 1991) (authorizing warrantless arrest where the officer "has reasonable cause to believe that the person arrested has committed an offense"); Me. Rev. Stat. Ann. tit. 15, § 704 (West 1980) (authorizing warrantless arrest of "persons found violating any law of the State or any legal ordinance or bylaw of a town") and Me. Rev. Stat. Ann. tit. 17-A, § 15 (West 1983 & Supp. 1997) (authorizing warrantless arrests for misdemeanors in the officer's presence); Md. Ann. Code art. 27, § 594B(a) (1957) (authorizing officer's warrantless arrest of any person who commits, or attempts to commit, "any felony or misdemeanor" in the presence of the officer); Mass. Gen. Laws Ann. ch. 276, § 28 (West 1990) (warrantless arrest authorized for designated misdemeanor

offenses) and Mass. Ann. Laws ch. 272, § 60 (Law. Co-op. 1994 & Supp. 1997) (authorizing warrantless arrest for littering offenses where identity of arrestee is not known to officer); Mich. Comp. Laws Ann. § 28.6(5) (West 1994) (authorizing warrantless arrests "for all violations of the law" committed in the officer's presence); Mich. Stat. Ann. § 28.874(a) (Law. Co-op 1985 & Supp. 1997) (authorizing warrantless arrests where "[a] felony, misdemeanor, or ordinance violation is committed in the peace officer's presence"); Minn. Stat. Ann. § 629.34 (West 1983) (authorizing warrantless arrest "when a public offense has been committed or attempted in the officer's or constable's presence"); Miss. Code Ann. § 45-3-21(1)(a)(vi) (1991) (authorizing warrantless arrest by Highway Safety Patrol of "any person or persons committing or attempting to commit any misdemeanor, felony or breach of the peace within their presence or view"); Mo. Ann. Stat. § 479.110 (Vernon 1987) (authorizing warrantless arrest of "any person who commits an offense in [the officer's] presence"); Mont. Code Ann. § 46-6-311(1) (1997) (authorizing warrantless arrest if "the officer has probable cause to believe that the person is committing an offense or that the person has committed an offense and existing circumstances require immediate arrest"); Neb. Rev. Stat. §§ 60-683, 81-2005 (1996) (authorizing warrantless arrest for misdemeanors committed in the officer's presence); Nev. Rev. Stat. § 171.172 (1996) (authorizing warrantless arrest by officer when a person commits "any criminal offense" in the presence of the officer); N.H. Rev. Stat. Ann. § 614:7 (1996) (authorizing warrantless arrest of any person who has committed "any criminal offense" in the presence of the officer); N.J. Stat. Ann. § 53:2-1 (West 1986 & Supp. 1997) (authorizing officers to arrest without a warrant "for violations of the law committed in their presence"); N.M. Stat. Ann. § 66-2-12(A)(2) (Michie 1978 &

1994 Repl.) (authorizing warrantless arrests for motor vehicle code violations committed in the presence of the officer); N.Y. Laws § 140.10 (Consol. 1992 & Supp. 1997) (authorizing warrantless arrest by a police officer for "[a]ny offense" committed in the officer's presence); N.C. Gen. Stat. § 15A-401(b) (1997) (authorizing a warrantless arrest where an officer has probable cause to believe the person has committed "a criminal offense" in the officer's presence"); N.D. Cent. Code § 29-06-15 (1991) (authorizing warrantless arrest "[f]or a public offense, committed or attempted in the officer's presence"); Ohio Rev. Code Ann. § 2935.03 (Baldwin 1997) (authorizing warrantless arrest of a person "found violating * * * a law of this state, an ordinance of a municipal corporation, or a resolution of a township"); Okla. Stat. Ann. tit. 22, § 196 (West 1992) (authorizing warrantless arrests "[f]or a public offense, committed or attempted in [the officer's] presence"); Or. Rev. Stat. § 133.310(1)(i) (1995) (authorizing warrantless arrest upon probable cause for any offense occurring in the officer's presence except traffic infractions and other offenses punishable only by a fine); 71 Pa. Cons. Stat. Ann. § 252(a) (West 1990) (authorizing warrantless arrests by state police "for all violations of the law, including laws regulating the use of the highways, which they may witness"); R.I. Gen. Laws § 12-7-3 (1994) (authorizing warrantless misdemeanor and petty misdemeanor arrests where "the officer has reasonable grounds to believe that [the] person cannot be arrested later or may cause injury to himself or others or loss or damage to property unless immediately arrested"); S.C. Code Ann. § 17-13-30 (Law. Co-op. 1976 & Supp. 1997) (authorizing warrantless arrests of persons who, in the presence of the officer, "violate any of the criminal laws of this State"); S.D. Codified Laws Ann. § 23A-3-2 (Michie 1988 & Supp. 1997) (authorizing warrantless arrest by officer "[f]or a public

offense, other than a petty offense, committed or attempted in his presence"); Tenn. Code Ann. § 40-7-103(1) (1997) (authorizing law enforcement officer to arrest without a warrant "[f]or a public offense committed or a breach of the peace threatened in his presence"); Tex. Crim. Code Ann. art. 14.01 (West 1977) (authorizing officer's arrest of offender without a warrant "for any offense committed in his presence or within his view,"); Utah Code Ann. § 10-3-915 (1996) (authorizing warrantless arrests for "any offense directly prohibited by the laws of this state or by ordinance"); Vt. R. Crim. P. 3(a) (1983 & Supp. 1997) (authorizing warrantless arrests where "a crime" is committed in the presence of the officer); Va. Code Ann. § 19.2-81 (Michie 1995) (authorizing warrantless arrest of "any person who commits any crime in the presence of such officer"); Wash. Rev. Code Ann. § 10.31.100 (West 1990 & Supp. 1997) (authorizing warrantless arrests for misdemeanors committed in the presence of the officer); W. Va. Code § 62-10-9 (1990 & Supp. 1997) (authorizing warrantless arrests "for all violations of any of the criminal laws of the United States, or of this state, when committed in [an officer's] presence"); Wis. Stat. Ann. § 968.07(1)(D) (West 1985) (authorizing warrantless arrest when "[t]here are reasonable grounds to believe that the person is committing or has committed a crime"); Wyo. Stat. Ann. § 7-2-102(b)(1) (Michie 1995 & Supp. 1997) (authorizing warrantless arrest when "any criminal offense" is committed "in the officer's presence").

(9)

No. 97-501

In The Supreme Court of the United States

October Term, 1997

RANDALL RICCI,

Petitioner,

vs.

ARLINGTON HEIGHTS, ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. IN SUPPORT OF NEITHER PARTY.

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**BRIEF AMICUS CURIAE
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This brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of

consent have been filed with the Clerk of this Court, as required by the Rules.[1]

INTEREST OF *AMICUS CURIAE*

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the law enforcement effort more effective, in a constitutional manner. It seeks to improve the operation of the law enforcement and corrections functions to protect our citizens in their life, liberties, and property, within the framework of the various state and federal constitutions.

AELE has previously appeared as *amicus curiae* over 100 times in the Supreme Court of the United States and over 35 times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

Amicus is an educational organization representing the interests of law enforcement at the national, state, and local levels. Our constituents include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of executing and overseeing the process of making arrests within the bounds of the law; and (2) legal advisors who are called upon to advise law enforcement officers

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[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: This brief was authored for the *amicus* by James P. Manak, Esq., counsel of record, and Wayne W. Schmidt, Esq., Executive Director, Americans for Effective Law Enforcement, Inc. No other persons authored this brief. Americans for Effective Law Enforcement, Inc., made the complete monetary contribution to the preparation and submission of this brief, without financial support from any other source, directly or indirectly.

and police and municipal administrators in connection with such matters, including the formulation and implementation of policy on the subject of arrests for minor offenses and infractions.

AELE maintains an independent posture, and will support only those law enforcement practices that conform to constitutional requirements. For example, in *Hudson v. McMillian*, 503 U.S. 1 (1992), we supported a prison inmate who sued correctional officers, arguing that recognition of his claim would discourage the use of minor, but excessive force by law enforcement and correctional officers.

STATEMENT OF THE CASE

Petitioner was the owner of a telemarketing business that sold advertising and conducted fundraising for a number of organizations, including a police union. In early 1994, the Arlington Heights, Illinois, police department began receiving complaints from citizens who were the targets of telephone solicitations conducted by petitioner's business. A detective investigated the business and determined that petitioner lacked a business license required by a village ordinance. The detective also discovered an outstanding warrant for the arrest of one of petitioner's employees. Thereafter, the detective and a fellow officer went to petitioner's place of business and arrested the employee pursuant to the warrant. At the same time, the officers searched some of petitioner's business papers, even though they had no warrant to do so, in hopes of finding material that would allow them to close down his business. The officers then asked petitioner if he had a business license and he confirmed that he did not. The officers summarily arrested him for violating Section 9-201 of the Village of Arlington Heights Code of Ordinances, which makes it unlawful to operate a business without a license.

Pursuant to village policy, petitioner was taken to the

Arlington Heights police station and locked in an interrogation room for approximately one hour while the officers prepared an arrest sheet and a local ordinance complaint, and approved and issued a bond receipt. After the paperwork was completed, petitioner was released on a recognizance bond. His wife obtained the business license while he was in custody, and when his case came to court, the charges were dismissed upon presentation of the license. Petitioner alleged that the police knew when they arrested him that he would be released on bond, that he would purchase a business license, and that the charges would be dismissed.

Petitioner brought a three count complaint under 42 U.S.C. §1983 against the Village of Arlington Heights and the police officers who arrested him, alleging that the officers engaged in an unconstitutional search of the premises, arrested him without probable cause, and violated his civil rights by subjecting him to a full custodial arrest for committing a fine-only offense. The parties settled the first claim, and petitioner did not appeal from the trial court's dismissal with prejudice of the second claim. Thus, the only claim before the court below, the Seventh Circuit Court of Appeals, *Ricci v. Arlington Heights, Ill.*, 116 F.3d 288 (7th Cir. 1997), was the one attacking the village policy that requires a full custodial arrest for violations of the business license ordinance.

The Seventh Circuit affirmed the trial court, ruling that a full custodial arrest for violating a village ordinance that involved only a fine and not potential incarceration, which ordinance involved the operation of a business without a license, was reasonable within the meaning of the Fourth Amendment. The court noted the arrestee committed the offense in the officers' presence, he was facing a possible fine of tens of thousands of dollars, and the officers held him for only one hour, which was basically the length of time it took to process the paperwork associated with the arrest.

The court said the Fourth Amendment reasonableness requirement does not forbid full custodial arrest, without a warrant, for a violation of a city ordinance that does not involve a breach of the peace and that is punishable only by fine, as long as the arresting officer has probable cause to believe that the arrestee has committed or is committing the offense, and state or municipal law authorizes the arresting officer to effect a custodial arrest for that offense.

The court noted that the Illinois common law rule that allowed an arrest for a misdemeanor committed in the presence of an officer only if that crime constituted a breach of the peace has been relaxed by statute, Ill. Stat. 725 ILCS 5/107-2 (1994), to include arrests for offenses other than breaches of the peace. *Nielsen v. Village of Lake in the Hills*, 948 F. Supp. 786 (N.D. Ill. 1996).

The United States Supreme Court granted certiorari on the issues:

(1) Does Fourth Amendment's Reasonableness Clause incorporate common-law rule prohibiting warrantless arrests in misdemeanor cases that do not involve breach of peace?

(2) May municipality, consistently with Fourth Amendment's Reasonableness Clause, require its police officers to make full custodial arrests for alleged violation of fine-only license ordinance "in order to ensure compliance with ordinance?"

SUMMARY OF ARGUMENT

Amicus takes the position that a citation procedure, rather than a full custodial arrest, in situations such as presented by this case, fully comports with the reasonableness requirements of the Fourth Amendment and is the preferred means of processing such a case. This question should not be resolved by a per se rule or a fixed municipal policy, but should depend

upon a number of factors presented by a particular case. Modern model codes have adopted and encouraged such citation procedures as alternatives to summary arrests for minor offenses. This Court should encourage the continuation of this process of modernizing the law of the states on the subject of arrest for minor offenses to comport with reasonableness requirements and best practices.

ARGUMENT

OFFICERS SHOULD BE REQUIRED TO USE A CITATION WHEN THEY ENFORCE PETTY OFFENSES, UNLESS THERE ARE CIRCUMSTANCES WHICH SUGGEST THAT A CUSTODIAL ARREST IS NECESSARY.

The court below, in approving the constitutionality of the procedure adopted by the police in this case, relied upon prior case law in the Circuit, *United States v. Trigg*, 878 F.2d 1037 (7th Cir. 1989). In *Trigg* the court said that the reasonableness of an arrest depends on the existence of two objective factors:

> First, did the arresting officer have probable cause to believe that the defendant had committed or was committing an offense. Second, was the arresting officer authorized by state and or municipal law to effect a custodial arrest for the particular offense. If these two factors are present, we believe that an arrest is necessarily reasonable under the Fourth Amendment. This proposition may be stated in another way: so long as the police are doing no more than they are legally permitted and objectively authorized to do, an arrest is constitutional.

United States v. Trigg, 878 F.2d at 1041.

Amicus submits, however, that the decision to make a custodial arrest for a minor offense should not be predetermined

by a per se rule, whether based on a statute or a municipal policy (as is present in this case). *See e.g.*, *People v. Scalisi*, 324 Ill. 131, 154 N.E. 715 (1926) (prior to modification represented by Ill. Stat. 725 ILCS 5/107-2 (1994)); *Commonwealth v. Wright*, 158 Mass. 149, 33 N.E. 82 (1893); *Kennedy v. State*, 139 Miss. 579, 104 So. 449 (1925); *Commonwealth v. Leet*, 537 Pa. 89, 641 A.2d 299 (1994).

Relatively few states have retained the common law rule, represented by the above cases that such an arrest can be made without a warrant only where a breach of the peace has taken place in the presence of the arresting officer, 40 B.U.L. Rev. 58, 71-73 (1960); LaFave, *Search and Seizure*, § 5.1(b), 13 (3d ed. 1995), and many statutes reflect the legislative design of the Illinois statute and the accompanying provisions dealing with Summons, Ill. Stat. 725 ILCS 5/107-11 (1994); Notice to Appear, Ill. Stat. 725 ILCS 5/107-12 (1994); Release on Own Recognizance, Ill. Stat. 725 ILCS 5/110-2 (1994); and Taking of Bail by Peace Officer, Ill. Stat. 725 ILCS 5/110-9 (1994). *See* Schroeder, "Warrantless Misdemeanor Arrests and the Fourth Amendment," 58 Mo. L. Rev. 771, 777-84 (1993).

Amicus takes no position on whether the common law rule is necessarily subsumed by the Fourth Amendment Reasonableness Clause, as this Court decided in *Wilson v. Arkansas*, 115 S. Ct. 1915 (1995), in the context of the knock and announce requirement. But we do note that the Court has wisely eschewed the adoption of inflexible, so-called "bright line" rules, in favor of objective reasonableness based upon the totality of the circumstances. *See, e.g.*, *Wilson v. Arkansas*; *Whren v. United States*, 116 S. Ct. 1777 (1996); *Ohio v. Robinette*, 117 S. Ct. 417 (1996); *Maryland v. Wilson*, 117 S. Ct. 882 (1997); *Richards v. Wisconsin*, 117 S. Ct. 1416 (1997).

Model code development has supported this trend, and in doing so has clearly opted for a non-summary arrest procedure unless extenuating circumstances dictate a summary arrest.

For example, the Model Code of Pre-Arraignment Procedure (ALI: 1975) adopts the position in § 120.1(1), that an officer may arrest for a misdemeanor without a warrant if he has reasonable cause to believe that the person committed it in his presence or merely if he has reasonable cause to believe that the person committed it, but in the latter instance it is also required that "the officer has reasonable cause to believe that such person (i) will not be apprehended unless immediately arrested; or (ii) may cause injury to himself or others or damage to property unless immediately arrested."

The code goes on to provide a procedure for the use of a citation in lieu of an arrest without a warrant:

> Section 120.2. Citation in Lieu of or in Connection with Arrest Without a Warrant
>
> (1) Citation Without Arrest. A law enforcement officer acting without a warrant who has reasonable cause to believe that a person has committed an offense may, subject to the regulations to be issued pursuant to Subsection (4) of this Section, issue a citation to such person to appear in court in lieu of arresting him.
>
> (2) Citation After Arrest. A law enforcement officer who has arrested a person without a warrant may, subject to the regulations to be issued pursuant to Subsection (4) of this Section, issue a citation to such person to appear in court in lieu of taking him to a police station as provided in Section 120.9.
>
> (3) Procedure for Issuing Citations. In issuing a citation hereunder the officer shall proceed as follows:
>
> (a) He shall prepare a written citation to appear in court, containing the name and address of the cited person and the offense for which the citation is issued, and stating when the person shall appear in court. Unless the person requests an earlier date, the time specified in the citation to appear shall be at least three days after the issuance of the citation.

> (b) One copy of the citation to appear shall be delivered to the person cited, and such person shall sign a duplicate written citation which shall be retained by the officer.
>
> (c) The officer shall thereupon release the cited person from any custody.
>
> (d) As soon as practicable, one copy of the citation shall be filed with the court specified therein, and one copy shall be delivered to the prosecuting attorney.
>
> At least 24 hours before the time set in the citation for the cited person to appear, the prosecuting attorney, or other person authorized by law to issue a complaint for the particular offense, shall either issue and file a complaint charging such person with an offense, or file with the court and deliver to such person a notice that a complaint has been refused and that such person is released from his obligation to appear. [Any person who wilfully violates a citation to appear in court hereunder is guilty of a misdemeanor.]

Model Code of Pre-Arraignment Procedure (ALI: 1975). *Also see* § 130.2(1)(b), and the Commentary thereto, p. 338, *et seq.*

A similar approach is found in the Uniform Acts, Rules of Criminal Procedure, Procedures Before Appearance (Approved Draft 1974), Rules 211, 221, 222, and the ABA Standards, Pre-trial Release, 1.1., 2.2(c)ii (Approved Draft 1968).

The point we wish to underscore is simply that a police officer's decision whether to make a summary arrest for a minor offense should depend upon many factors–whether embodied in a statute or a department policy–including such things as:

(1) Whether the offense involves a matter of public safety, including a breach of the peace or threatening behavior;

(2) Whether the offender's identity is known and verifiable;

(3) Whether nontestimonial evidence is needed, such as a driver's blood alcohol concentration;

(4) Whether the offender is a resident of the area;

(5) Whether the offender is likely to repeat his or her law violations unless summarily arrested (*e.g.*, disrupting First Amendment activity at an abortion clinic or civil rights demonstration);

(6) Whether the offender has a history of failing to respond to citations and summonses;

(7) Whether the offender may be in need of medical assistance or may be in a predicament where the officer may have a civil duty to protect the offender (*e.g.*, a pedestrian on a busy highway or in a dangerous neighborhood), etc.;

(8) Whether the officer may have a community caretaking function to perform in connection with an offender, (*e.g.*, preserving the offender's property, safeguarding unattended children, etc.).

Amicus does not propose this list as exhaustive, and refers the Court to the several factors listed in the model codes and their commentaries. We note as well, that in applying a list of factors in such situations, there is a danger that the homeless and other disadvantaged persons are less likely to qualify for a citation or immediate release. Legislatures and the courts must be sensitive to this problem. Police administrators should be mindful of this concern when they adopt written policies and design training programs.

Our point, however, is simply that a per se rule on the subject before the Court is not required by the Fourth Amendment Reasonableness Clause nor desirable from a judicial policy standpoint. *Wilson v. Arkansas*; *Whren*; *Robinette*; *Maryland v. Wilson*; *Richards*; *supra*. We believe the states should be encouraged to adopt flexible procedures for such arrests within the parameters of objective reasonableness, using the model codes as examples and existing state statutes incorporating various code features as models. We would not tie the hands of police and prosecutors in exercising reasonable

discretion in weighing relevant factors in making the decision whether an arrest warrant, summons, or a summary arrest is the preferred choice in a particular case.

The real vice in the present case is the use of an inflexible municipal policy to make a summary arrest for a simple ordinance violation. The violation of the ordinance by petitioner was open and notorious (he admitted to it) and involved no breach of the peace or danger to the public. In fact, *this was a mere business ordinance*.

There was simply no necessity to make a summary arrest in this case, and a referral to existing Illinois statutes dealing with arrest warrants (Ill. Stat. 725 ILCS 5/107-9) and summonses (Ill. Stat. 725 ILCS 5/107-11), even in the absence of a code-driven list of criteria found in a statute, makes it clear that the arrest and detention of petitioner in this case was an abuse of the discretion found in the Illinois statutes and objectively unreasonable under the Fourth Amendment for purposes of liability under 42 U.S.C. § 1983.

Under the Illinois statutes the authorities could readily have applied for an arrest warrant for the petitioner and the issuing court could have substituted a summons in lieu of a warrant. It can be inferred that the authorities had some "special agenda" in mind for the petitioner to make a completely unnecessary summary arrest for a business license violation and detain him against his will for an hour in an interrogation room while the booking paperwork was completed. It is just this kind of high-handed and arbitrary action that impels *amicus* to urge this Court to place restraining limits on the police in making warrantless arrests for minor offenses and infractions.

As law enforcement administrators and legal advisors, AELE believes that a reversal of the court below will hasten the adoption of flexible and reasonable statutes and policies on the subject of warrantless arrests for minor offenses. Such a

decision will further the adoption of progressive statutes and law enforcement policies on the subject for the benefit of all our citizens, and will at the same time advance the cause of effective law enforcement.

CONCLUSION

Amicus urges this Court to reverse the decision of the court below on the basis of the precedents of this Court and sound judicial policy.

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(10)

No. 97-501

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RANDALL RICCI,

Petitioner,

VS.

VILLAGE OF ARLINGTON HEIGHTS,

Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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OCTOBER TERM, 1997

RANDALL RICCI,
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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (the "NACDL") is a professional bar association founded in 1958 to advance the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of a crime or other misconduct. Today, the NACDL has almost 10,000 direct members and 80 affiliates representing another 28,000 members, which include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges. The NACDL has members in all fifty states, and the American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

[1] Both parties have consented to the filing of this brief. Counsel for the NACDL authored this amicus brief in whole, and no parties other than those listed in Supreme Court Rule 37.6 made a monetary contribution to the preparation or submission of the brief.

Among the NACDL's objectives is to deter overreaching conduct by law enforcement officers by vigorously defending the protections guaranteed by the Constitution. The NACDL believes that this case may have a significant impact on determining the scope of the Fourth Amendment's prohibition against unreasonable seizures. Therefore, the NACDL presents this brief in support of the Petitioner to urge this Court not to permit routine custodial arrests for ordinance violations punishable only by fine.

SUMMARY OF ARGUMENT

The Fourth Amendment's prohibition against unreasonable searches and seizures should be held to prohibit custodial arrests for fine-only offenses not involving a breach of the peace or presenting a danger to the public health or safety. Petitioner Ricci's arrest would violate this rule. The business licensing ordinance that Ricci was arrested for violating is barely a criminal provision at all. For virtually all purposes except the law of arrest, Illinois law treats it as a civil provision. According to available evidence, the common law as of 1789, when the Bill of Rights was adopted, did not allow arrests for alleged violations of such ordinances.

Furthermore, a balancing of the interests at stake does not justify a custodial arrest in this circumstance. This Court always has recognized that an arrest is a very serious deprivation of liberty. In comparison, the fact that Respondent Village of Arlington Heights has limited the penalty to fines expresses the comparatively minimal importance it places on preventing or punishing violations. Moreover, the two governmental interests that Arlington Heights has asserted — to coerce compliance with the ordinance, and to bring an alleged offender before a magistrate — do not require an arrest. A citation, coupled with the threat of $500-a-day fines, would be at least as effective in persuading an out-of-compliance business to obtain a license. Furthermore, in almost every case, a

summons would be equally effective in bringing the operator of such a business before a court.

At the least, the Court should interpose a neutral and detached magistrate between the police and alleged offenders, by requiring a warrant before an officer may arrest under such an ordinance.

ARGUMENT

I. THE FOURTH AMENDMENT'S REASONABLENESS CLAUSE SHOULD BE HELD TO FORBID FULL CUSTODY ARRESTS FOR VIOLATIONS OF FINE-ONLY ORDINANCES NOT INVOLVING A BREACH OF THE PEACE OR A THREAT TO PUBLIC HEALTH OR SAFETY.

A. In the Framers' Time, the Common Law Prohibited Arrests for Minor, Summary Offenses.

"The Fourth Amendment to the Constitution protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'"[2] *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). In determining the content of this open-ended provision, the Court typically has begun by looking to "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing." *Id.* (citing *California v. Hodari D.*, 499 U.S. 621, 624 (1991);

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[2] The Fourth Amendment applies to the states through the Fourteenth Amendment. *See, e.g., Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961).

United States v. Watson, 423 U.S. 411, 418-20 (1976); *Carroll v. United States*, 267 U.S. 132, 149 (1925)).

The available evidence shows that at the time of the framing, the common law did not allow arrests for offenses similar to the Arlington Heights licensing ordinance. Operating a business without a license is similar to a summary offense, which at common law was tried without a jury before a magistrate. Summary offenses included violations of laws regulating the highways, the Sabbath, liquor, and trade. Floyd Feeney, *The Police and Pretrial Release* 12 (1982); Julius Goebel Jr. & T. Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776)* 418 n.186 (1944).

> For offenses merely arising by penal statutes, and not connected with any breach of the peace, a justice has no authority, as necessarily incident to the cognizance of the offence; to apprehend the accused in the first instance, or even after a summons and a default, but can only summon him to attend, and in default of his appearance proceed *ex parte*.

W. Paley, *The Law and Practice of Summary Convictions on Penal Statutes by Justices of the Peace* 19 (London, 1814).[3] Parliament empowered magistrates to issue warrants only "in a variety of cases where there may be reason to apprehend, from the nature of the offence, or the probable description of the offender, that the object of the prosecution would be defeated by giving him notice." *Id.* at 19-20.

[3] Further, misdemeanor arrests were permitted only when there was a breach of the peace. Edward C. Fisher, *Laws of Arrest* 181 (Robert L. Donigan, ed. 1967).

In cases where there was no need to issue a warrant, the common law treated summary offenses much like civil violations, with the magistrate merely requesting that the allegedly offending party appear. *Id.* at 20. If the party did not appear, the magistrate typically could not force an appearance but would simply enter a default judgment. *Id.*[4]

There is little doubt that fine-only municipal ordinances such as the Arlington Heights ordinance at issue here come within these common law rules. Ordinance violations such as this are typically treated only as civil or quasi-criminal offenses, especially when imprisonment is not authorized. Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 1.7(c) (2d ed. 1986). Consistent with this principle, Illinois law does not classify the Arlington Heights licensing ordinance as a misdemeanor, or, in most important respects, as a criminal provision at all.

[4] Police departments organized along modern lines first appeared in about the mid-1800s, and certain rules regarding arrests for minor offenses then began to change. Feeney, *supra*, at 13. Legislatures conferred on the new police forces broader powers, including the power to make warrantless arrests for misdemeanors and some ordinance violations. *Id. See also* Horace L. Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. (part 1) 541, 577 & (part 2) 673, 705-09 (1924). However, even these broader powers were limited. Many states permitted non-felony offenders to be arrested only if the offense was committed in the officer's presence. Fisher, *supra*, at 180-81. Even today, some states confine this power to misdemeanors committed in an officer's presence and involving a breach of the peace or to more serious misdemeanors. *See, e.g.*, Ind. Code Ann. § 35-33-1-1 (West, WESTLAW through End 1997 1st Sp. Sess.); Mass. Gen Laws Ann. ch. 276, § 28 (West, WESTLAW through 1st Sess. 1997). Under such rules, the arrest of Petitioner Ricci would have been unauthorized. It was for a non-serious offense that did not involve a breach of the peace and that also possibly was not committed in an officer's presence, as the officer evidently did not witness Ricci actually conducting any business.

Illinois municipalities may enact ordinances punishable by fine or non-incarceration penalty only, as well as certain minor misdemeanors, 65 Ill. Comp. Stats. 5/ 1-2-1 & 5/1-2-1.1 (West, WESTLAW through P.A. 90-925 approved 8/14/97). However, fine-only ordinance offenses do not qualify as misdemeanors. *City of Peoria v. Toft*, 574 N.E.2d 1334, 1336 (Ill. App. Ct. 1991); *Village of Mundelein v. Hartnett*, 454 N.E.2d 29, 32 (Ill. App. Ct. 1983). Indeed, Illinois law allows a violation of such an ordinance to be proven only by a clear preponderance of the evidence, *City of Chicago v. Joyce*, 232 N.E.2d 289, 291 (Ill. 1967), rather than by the constitutionally required criminal standard of beyond a reasonable doubt, *see Jackson v. Virginia*, 443 U.S. 307, 317-18 (1979); *In re Winship*, 397 U.S. 358, 364 (1970). Prosecuting municipalities are also allowed to appeal judgments of acquittal, despite the United States and Illinois Constitutions' proscriptions against double jeopardy. *Town of Normal v. Bowsky*, 492 N.E.2d 204, 205 (Ill. App. Ct. 1986). And the 160-day period within which Illinois requires criminals to be tried does not apply. *City of Chicago v. Wisniewski*, 295 N.E.2d 453, 454 (Ill. 1973). In fact, if enforcement of the ordinance violation is instituted by a summons rather than an arrest, the Illinois catch-all five-year statute of limitations for civil actions applies. *Toft*, 574 N.E.2d at 1336 (allowing action to recover parking fines over three years after ticketing). As the Illinois Supreme Court has explained, "the recovery of a fine for an ordinance violation has been historically treated in Illinois as a civil action to recover a debt." *People v. Datacom Sys. Corp.*, 585 N.E.2d 51, 60 (Ill. 1991).

Thus, the common law at the time of framing would not have allowed Petitioner Ricci's arrest for violation of the Arlington Heights licensing ordinance.

B. Full-Custody Arrests for Violations of the Licensing Ordinance Are Unreasonable Under the Court's Balancing Test.

1. No Important Public Interest Justifies Full Custody Arrests for Fine-Only Municipal Ordinances Not Involving a Breach of the Peace or Threat to Public Health or Safety.

In addition to looking to the common law, this Court's decisions have employed a balancing test to measure police practices against the requirements of the Fourth Amendment reasonableness clause. *See, e.g., Maryland v. Wilson*, 117 S. Ct. 882, 885-86 (1997); *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968); *Camara*, 387 U.S. at 534-35.

This balancing test asks, ultimately, whether a sufficiently weighty public interest outweighs the private interest at stake in privacy, freedom or bodily integrity. The more intrusive the police practice, the more compelling the necessary justification must be. Consequently, analysis typically begins with examination of the private interest. *E.g., Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-18 (1989).

A custodial arrest is an extremely intrusive and humiliating procedure. As one commentator has summarized:

> One arrested is no longer free to walk away, but also is suddenly in the control of another human being.

If he resists, force will be used. A person who is arrested can no longer choose when he eats, with whom he associates, where or whether he will sit or stand, or even if he may go to the bathroom.

. . . A person arrested is booked; a record is made of the arrest, usually including fingerprints and sometimes photographs. The record may be permanent, whether or not the individual is ultimately convicted of the offense for which he or she is charged. The arrestee will certainly be searched. Although the search may be limited to a frisk, it is nonetheless more than a mere "petty indignity" as "the officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin . . ., and entire surface of the legs down to the feet."

Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temp. L. Rev. 221, 264 (1989) (citations omitted) (quoting *Terry*, 392 U.S. at 17 & 17 n.13). Although Ricci's custodial arrest and subsequent detention lasted only about an hour — because of his wife's ability to secure his release by obtaining a business license — not every arrestee may be so fortunate. A person arrested without a warrant who is unable to post bond may remain in police custody as long as 48 hours before being presented to a magistrate. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991).[5]

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[5] Also, with carte blanche powers to arrest, law enforcement officers would have broad power to use arrests for minor ordinance violations as a pretext (continued...)

No interest of Arlington Heights justifies this intrusion for suspected violations of the licensing ordinance. In the Court of Appeals, Arlington Heights asserted two interests, neither of them sufficient. First, it said that arrests may coerce compliance with the licensing requirement, as, indeed, happened here. Second, Arlington Heights asserted that arresting an alleged violator allows the police to bring the person before a magistrate to set bond. In this way, arrests help assure the alleged violator's appearance in court.

To begin with, the weight of these interests is not very great when the offense involves a quasi-criminal provision, punishable only by fine. As this Court stated in *Welsh v. Wisconsin*, 466 U.S. 740, 754 n.14 (1984):

> Given that the classification of state crimes differs widely among the States, the penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense.

Because Arlington Heights has determined that incarceration would be disproportionate as a penalty for violations of the licensing ordinance, it is inconsistent to assert that incarceration is justified prior to adjudication. *See Williams v. Illinois*, 399 U.S. 235, 243-45 (1970) (failure to pay fine may not increase period of incarceration

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[5](...continued)
to conduct a full custodial search. *See* 3 Wayne R. LaFave, *Search and Seizure* § 5.2(e), at 85-86 (1996); *United States v. Robinson*, 414 U.S. 218, 248 (1973) (Marshall, J., dissenting) ("There is always the possibility that a police officer, lacking probable cause to obtain a search warrant, will use a traffic arrest as a pretext to conduct a search.").

beyond crime's maximum sentence). *Cf. Bearden v. Georgia*, 461 U.S. 660, 667-69 (1983); *Tate v. Short*, 401 U.S. 395, 398-99 (1971).

Moreover, arrests are patently unnecessary to protect the interests that Arlington Heights asserts. A citation, coupled with the credible threat of $500-a-day fines, would be at least as coercive. And it is fanciful to suggest that arrests are even presumptively necessary to bring operators of on-going businesses before a court for violations of the licensing ordinance. Arrests are no more necessary in such cases than in run-of-the-mill civil cases. Surely a citation or summons would be equally effective to secure the operator's presence.[6]

Although the Court has not yet decided this question, it long has been observed that custodial arrests are inappropriate for violations such as this. As Justice Stewart stated a quarter century ago: "It seems to me that a persuasive claim might have been made . . . that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments." *Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring). Professor LaFave likewise has written that "the proposition that the fourth amendment should be construed to bar custodial arrests for minor violations is an appealing one." Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 Mich. L. Rev. 442, 487-88 (1990). *See also State v. Harmon*, 910 P.2d 1196, 1204 (Utah 1995) ("'It should be the policy of every law enforcement

[6] Moreover, by routinely dismissing prosecutions once the business obtains a license, Arlington Heights has made clear that it is satisfied by the cessation of unlicensed business operations Thus, flight itself could satisfy Arlington Heights's interests.

agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law.'") (quoting 2 Wayne R. LaFave, *Search and Seizure* § 5.1(h) at 432 (1987)); *Barnett v. United States*, 525 A.2d 197, 199 (D.C. 1987) (arresting for fine-only pedestrian walking offence violated arrestee's Fourth Amendment rights).

Prohibiting custodial arrests for these civil or quasi-criminal wrongs would also be consistent with a number of lower court decisions that the Fourth Amendment prohibits custodial arrests of material witnesses or civil defendants when the purpose of the arrest can be accomplished in a less intrusive way. *See, e.g., United States v. Ward*, 488 F.2d 162, 170 (9th Cir. 1973) (stopping car to interview witness was unreasonable; agents could have "sought an interview with the appellant at either his home or place of business"); *Bacon v. United States*, 449 F.2d 933, 943 (9th Cir. 1971) (material witness may be arrested only if his presence cannot be secured by subpoena); *State v. Klinker*, 537 P.2d 268, 278 (Wash. 1975) (en banc) (arrest in civil filiation proceeding unreasonable, where summons and complaint procedure would be effective). Professor LaFave concluded from such decisions that "it is not fanciful to suggest that persons suspected of relatively minor criminal violations should also be so protected." Wayne R. LaFave, *"Seizures" Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. Mich. J.L. Reform 409, 440 (1984).

2. This Court's Decision in *Whren v. United States* Does Not Preclude Use of the Balancing Test.

The Court of Appeals believed that this Court's decision in *Whren v. United States*, 116 S. Ct. 1769 (1996), precluded "a balancing analysis." *Ricci v. Arlington Heights*, 116 F.3d 288, 291

(7th Cir. 1997). According to that court, probable cause that the ordinance had been violated made balancing unnecessary, but the court was mistaken.

Whren did not present the issue that is now before the Court. In that case, the Court held that probable cause of traffic violations, without more, justified a *stop* of the vehicle under the Fourth Amendment reasonableness clause. There was no issue in *Whren* of whether the traffic violations would have allowed an arrest, and nothing in the Court's opinion suggested they would. A plain-clothes officer approaching the car immediately observed what appeared to be crack cocaine, and arrested the driver and passenger for drug offenses, not the traffic violations. 116 S. Ct. at 1772.

Because of the ubiquity of minor traffic regulations and asserted impossibility of driving without violating one, the petitioners in *Whren* urged the Court to fashion a new rule restricting or regulating officers' ability to stop vehicles in order to reduce the possibility of pretextual stops. The *Whren* petitioners argued that a balancing test supported creation of such a rule. The Court rejected the argument, stating:

> Where probable cause has existed, the only cases in which we have found it necessary actually to perform the "balancing" analysis involved searches or seizures conducted in an extraordinary manner .... The making of a traffic stop out-of-uniform does not remotely qualify as such an extreme practice, and so is governed by the usual rule that probable cause to believe the law has been broken "outbalances" the private interest in avoiding police contact.
>
> ....

> For the run-of-the-mine case, which this surely is, we think there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure.

Id. at 1776-77.

Here, an arrest on the basis of the Arlington Heights licensing ordinance *is* extraordinary. That ordinance, if it is a criminal provision at all, is barely one. It seems criminal only in the sense that Illinois law allows arrests upon probable cause to believe that it has been violated. *People v. Edge*, 94 N.E.2d 359, 363 (Ill. 1950) (authorizing arrest).[7] Once the arrestee has been brought before the court, however, the "criminal" attributes of the ordinance virtually disappear. From that point forward, procedures, including the burden of proof, are essentially similar to those in civil cases. Moreover, Petitioner here is not seeking to displace a common law rule. On the contrary, in this case — unlike *Whren* — traditional common law principles and the Fourth Amendment balancing test both produce the same result, namely that custodial arrests for violations of this licensing ordinance should not be allowed.

3. The Proposed Rule Is Consistent with Normal Law Enforcement Practices.

Precluding arrests under these circumstances will not impede any legitimate and useful law enforcement practice. It certainly will not call into question the long-established practice of law enforcement *stops* for traffic violations, even when such

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[7] The *Edge* court explained, however, that "an action for a violation of a municipal ordinance is both tried and reviewed as a civil proceeding." 94 N.E.2d at 363.

violations are punished only by fines. Unlike an arrest, a stop is necessary for an officer to issue a citation (or warning). Moreover, the line between stops and arrests is a familiar one. Numerous cases recognize the difference between traffic stops and other stops short of arrest, on the one hand, and custodial arrests, on the other; several decisions of this Court turn on the distinction. *See, e.g.*, *United States v. Hensley*, 469 U.S. 221 (1985) (investigatory stop upheld on reasonable suspicion short of probable cause); *Berkemer v. McCarty*, 468 U.S. 420 (1984) (roadside questioning during traffic stop did not require warnings that are necessary upon arrest).

Forbidding arrests for fine-only offenses, not involving breach of the peace or a threat to public health or safety, also will not impede enforcement of so-called "quality of life" laws. A recent, and well publicized, law enforcement strategy requires active enforcement of such prohibitions. *See, e.g.*, William Bratton, *Turnaround: How America's Top Cop Reversed the Crime Epidemic* (1998); John Leo, *You might Even Want to Live There*, Newsweek, Nov. 4, 1996, at 19. Implementing this strategy, former New York City Police Commissioner William Bratton directed Transit Authority officers to target subway turnstile jumpers for arrest. Bratton, *supra*, at 152-56. The rule we propose would not hinder this strategy. New York law classifies fare evasion as a Class A misdemeanor, punishable by a year in jail and $1,000 fine. N.Y. Penal Law §§ 70.15, 80.05, 165.15 (McKinney 1988, 1998 & Supp. 1998); *People v. Anderson*, 489 N.Y.S.2d 486, 486-67 (N.Y. App. Div. 1985). Other significant "quality of life" prohibitions likely carry similar penalties, and several such offenses involve a breach of peace or a risk to public health and safety, *e.g.*, prohibitions against public urination or defecation. The common

law permitted arrests for such offenses, and for them, the outcome of the balancing test will likely be different.[8]

II. AT THE LEAST, THE COURT SHOULD REQUIRE A WARRANT FOR CUSTODIAL ARRESTS IN THESE CIRCUMSTANCES.

At the least, a warrant should be required before an arrest for violation of a fine-only ordinance, not involving a breach of the peace or threat to the public health or safety. In view of the interests at stake on both sides, a neutral magistrate should determine whether there is probable cause, and should at least have the opportunity to consider whether an arrest warrant, rather than a summons, is necessary.

In numerous decisions, this Court has explained and enforced the Fourth Amendment's preference for warrants for both searches *and seizures*. *Beck v. Ohio*, 379 U.S. 89, 96 (1964); *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1962); *Terry*, 392 U.S. at 20 (1968); *Davis v. Mississippi*, 394 U.S. 721, 728 (1969). The warrant requirement serves as a "checkpoint" between the government and the public, where a neutral and detached magistrate is able to weigh the strength of the government's evidence against the liberty interest that the government's contemplated action will

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[8] It also should be mentioned that nothing in the rule we propose will undercut an apparent trend toward requiring arrests in cases of domestic violence. At least 15 states and the District of Columbia have enacted mandatory arrest laws in such cases. Marion Wanless, Note, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?*, 1996 U. Ill. L. Rev. 533, 538. Congress also passed the Violence Against Women Act, which provides funds to states that implement mandatory arrest programs. *Id.* at 543. But the offenses targeted by the such laws are at least misdemeanor crimes, not fine-only ordinance violations. Moreover, these offenses involve obvious threats to public safety.

invade. *Steagald v. United States*, 451 U.S. 204, 212-13 (1981); *see also Johnson v. United States*, 333 U.S. 11, 14 (1948). However, the Court's preference for arrest warrants is not as strong when there are circumstances of special need, such as when the police have probable cause to believe that the person to be arrested has committed a felony or when the police have reason to believe that the suspect is dangerous. *Watson*, 423 U.S. at 419-20 (warrantless arrest of felon in public place); *Minnesota v. Olson*, 495 U.S. 91, 100-01 (1996) (warrantless entry into home to arrest actual murderer possibly justified) (dicta).

Alleged violations of fine-only ordinances, such as the Arlington Heights licensing ordinance, simply present no need to dispense with a warrant. The Village has expressed its low concern about violations, by choosing to punish them only with fines. *Cf. State v. Nelson*, 914 P.2d 97, 100 n.14 (Wash. Ct. App.), *review denied*, 922 P.2d 99 (Wash. 1996) (by making misdemeanor offense punishable only by fine, state "said, in essence, that it had only a minimal punishment interest in conduct of that sort"). Moreover, as we explain above, for virtually every other purpose, Illinois law treats this ordinance as a civil, not criminal provision.

A bright-line rule requiring a warrant in these circumstances would be consistent with the concern the Court expressed in *Watson*, when it declined to require case-by-case assessments of the need to dispense with arrest warrants. 423 U.S. at 423-24. The Court explained that it did not want "to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like." *Id.* The police would have clear guidance from a categorical rule forbidding warrantless arrests for fine-only offenses not involving a breach of the peace or a threat to public health or safety.

CONCLUSION

The Court should find that custodial arrests are unreasonable under the Fourth Amendment, when made for alleged violations fine-only ordinances not involving a breach of the peace or threatening the public health or safety. At the least, the police should obtain a magistrate's authorization before arresting for such quasi-criminal offenses.

Respectfully submitted,

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No. 97-501

In The

Supreme Court of the United States

October Term, 1997

RANDALL RICCI,

Petitioner,

v.

VILLAGE OF ARLINGTON HEIGHTS,
A MUNICIPAL CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER INSTITUTE FOR JUSTICE

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INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest law center committed to defending the essential foundations of a free society and securing greater protection for individual liberty. Central to the mission of the Institute for Justice is the protection of economic liberty, the right of an individual to earn an honest living in a chosen occupation, free from unreasonable or arbitrary government regulation. Toward that end, we have challenged numerous unconstitutional occupational licensing laws and the use of both civil and criminal penalties by governments to enforce those laws. We believe our expertise in this area can provide the Court with important and unique information that may be helpful in resolving the constitutional issue at stake in this case.

The Institute has obtained the consent of the parties to the filing of this brief, and letters of consent have been filed with the clerk.[1]

STATEMENT OF THE FACTS

Randall Ricci is the president of a telemarketing firm that does charitable solicitations for a number of organizations, including (ironically enough) police officer unions. In April 1994, two police officers in Arlington

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Heights, Illinois (a Chicago suburb) arrested Ricci at his place of business and charged him with operating a business without a license in violation of a fine-only municipal ordinance. As required by municipal policy, following his arrest, the officers transported Ricci to the police station where they locked him in an interrogation room for approximately one hour. While Ricci was in custody, his wife obtained the necessary business license and the ordinance violation was dismissed at his first court appearance. Following the conclusion of the state court proceedings, Ricci filed an action under 42 U.S.C. § 1983 against the Village for violation of his constitutional rights.

One of Ricci's claims in his civil rights complaint was that the Village's policy of requiring full custodial arrests for violations of fine-only ordinances not involving a breach of the peace violated the Fourth Amendment.[2] The district court concluded that the Village's policy of requiring arrests even for violations of its business-license ordinance did not offend the Fourth Amendment.

The United States Court of Appeals for the Seventh Circuit agreed, ruling that a municipality may require arrests for fine-only ordinances to "prevent[ ] Ricci from continuing to violate a law" and "in order to ensure compliance with the ordinance and in order to complete

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[2] Ricci also argued that he had been arrested without probable cause and that before arresting him, the police officers had illegally searched his premises by looking through various papers. The district court found against Ricci on the probable cause issue and the unreasonable search claim was settled. Neither claim is before this Court.

the necessary paperwork." *Ricci v. Village of Arlington Heights*, 116 F.3d 288, 291 (7th Cir. 1997). In the view of the Seventh Circuit, the arrest was "reasonable" under the Fourth Amendment, notwithstanding the common law prohibition on such arrests. This Court granted Ricci's petition for certiorari to determine whether the common law rule prohibiting full custodial arrests for violation of a fine-only ordinance not involving a breach of the peace is part of the Fourth Amendment.

SUMMARY OF ARGUMENT

The ability to arrest citizens is one of the most serious applications of state power to individuals. The Fourth Amendment to the United States Constitution guarantees our right to be free from unreasonable seizures at the hands of government officials. At the core of the Fourth Amendment lie fundamental protections of the common law. Among the protections afforded citizens at common law was the prohibition on warrantless arrests for minor offenses unless they involved a breach of the peace.

The United States Court of Appeals for the Seventh Circuit ignored this time-honored prohibition and instead adopted a more modern balancing approach to determine the reasonableness of Randall Ricci's arrest. The proper balance in this case, however, was already struck centuries ago in the traditions of the common law. Under a proper understanding of the Fourth Amendment based upon the common law and first principles, Mr. Ricci and others who violate minor laws that do not breach the peace cannot be subject to a warrantless, custodial arrest.

The ubiquity of licensing requirements and the proliferation of laws generally make it imperative that traditional protections against unlawful arrest be recognized today. Many licensing laws raise serious constitutional questions, and the potential for abuse of these laws is multiplied if enforcement officials possess the power to arrest for noncompliance. Enforcement of occupational licensing laws is typically given to licensing boards, often comprised of members of the regulated industries with a direct incentive to restrict competition and keep newcomers out of a profession. Protecting individuals from arrest for fine-only offenses that do not breach the peace will dramatically reduce the potential for abuse of licensing laws by government officials.

ARGUMENT

I. THIS COURT SHOULD DRAW ON THE COMMON LAW PRINCIPLES AT THE CORE OF THE FOURTH AMENDMENT BY RECOGNIZING THE TIME-HONORED PROHIBITION OF WARRANTLESS ARRESTS FOR MINOR OFFENSES NOT INVOLVING A BREACH OF THE PEACE.

The Fourth Amendment to the United States Constitution declares that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . " A full custodial arrest of an individual – like the arrest of Randall Ricci in this case – is the "quintessential 'seizure of the person' " under the Fourth Amendment. *California v. Hodari D.*, 499 U.S. 621, 624 (1991). An arrest has been traditionally defined as the "grasping or

application of physical force" by a police officer to a citizen. *Id.* It constitutes one of the most powerful and dramatic applications of state power to an individual. Not only do arrests constitute serious infringements on liberty, they also carry real-world consequences to individual citizens. The statement "So-and-So has been arrested" still carries enough shock value to most people that even a relatively routine arrest and detention like that experienced by Mr. Ricci could have serious repercussions among business associates, friends, and family. That is one of the reasons why strict rules governing arrests evolved at common law and were embodied in the Fourth Amendment.

Of course, many arrests, even those without a warrant, are constitutional, for the Fourth Amendment only prohibits "unreasonable" searches and seizures. The Fourth Amendment established a "practical compromise between the rights of individuals and the realities of law enforcement." *County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991). Courts normally strike the proper balance between these two principles to determine which searches and seizures are reasonable. *See, e.g., Payton v. New York*, 445 U.S. 573, 585 (1980) (a warrantless arrest "is a species of seizure required by the [Fourth] Amendment to be reasonable"). However, for the issue in this case, the balance has already been struck centuries ago in the traditions of the common law.

The common law clearly prohibited the warrantless arrest of an individual for a minor offense unless it involved a breach of the peace. A "peace officer" at

common law had "no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of the peace is about to be committed or renewed in his presence." *Halsbury Law's of England*, vol. 9, part III, 612 (*quoted in Carroll v. United States*, 267 U.S. 132, 156 (1925)).

This common law guarantee has direct bearing on protections afforded individuals under the Fourth Amendment. As Justice Story noted, the Fourth Amendment "is little more than the affirmance of a great constitutional doctrine of the common law." 3 J. Story, *Commentaries on the Constitution* 748 (1833). This Court has also held that the "common law . . . has guided interpretation of the Fourth Amendment." *Gernstein v. Pugh*, 420 U.S. 103, 114 (1976).[3] Typically, the Fourth Amendment assures protection of the common liberties of

[3] The common law is instructive in interpreting other provisions of the Constitution as well. Indeed, constitutional scholar Randy Barnett notes that the "freedom to act within the boundaries provided by one's common law rights may be viewed as a central background presumption of the Constitution. . . . " Barnett, "James Madison's Ninth Amendment," in *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* 41 (1989); *see also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (guaranteeing non-textual rights "long recognized at common law as essential to the orderly pursuit of happiness by free men"); *Ingraham v. Wright*, 430 U.S. 651, 672-73 (1977) (the Due Process Clause . . . was intended to give Americans at least the protection against government power that they had long enjoyed as Englishmen against the power of the Crown").

citizens that were guaranteed at the time of the Founding. *Hodari D.*, 499 U.S. at 633-34.

Although this Court has recognized some exceptions to common law rights, they are not relevant to the instant case. For instance, this Court has departed from the common law in Fourth Amendment cases when common law doctrines are vague or are not particularly instructive to the Court. *See, e.g., Steagwald v. United States*, 451 U.S. 204, 220 (1981) (explaining that common law "sheds relatively little light" on the legality of a warrantless intrusion on a third party's home); *McLaughlin*, 550 U.S. at 54-55 (noting that common law is unclear as to what constitutes a "prompt" post-seizure probable cause determination despite dissent's claim to the contrary). Also, this Court has recognized that certain modern realities of law enforcement have rendered common law rules inapplicable. *See, e.g., California v. Acevedo*, 500 U.S. 565 (1991) (recognizing that changes in the law may make a warrant necessary to satisfy reasonableness standard even if it was not required at common law); *Minnesota v. Dickerson*, 508 U.S. 366, 379-83 (1993) (Scalia, J., concurring) (suggesting that a frisk for weapons without probable cause might be "reasonable" today due to easy availability of concealed weapons even if such a search was unlawful at common law).

In this case, however, the common law could not be more clear or straightforward: warrantless arrests for minor offenses are prohibited unless they involve a breach of the peace. Likewise, contemporary realities make the common law rule even more compelling today. The ubiquity of licensing laws and the proliferation of regulations generally make it imperative that traditional

protections against unlawful arrest afforded to citizens at common law be recognized today. *See* Section II, *infra*.[4] Accordingly, permitting police officers to arrest individuals for violating fine-only ordinances not involving a breach of the peace must be recognized as an unreasonable seizure under the Fourth Amendment.

II. THE GROWTH OF OCCUPATIONAL LICENSING LAWS AND THEIR POTENTIAL FOR ABUSE BY LICENSING BOARDS MAKE IT IMPERATIVE THAT CONSTITUTIONAL RIGHTS BE RESPECTED WHEN GOVERNMENTS ENFORCE THESE LAWS.

The Seventh Circuit discounted the potential for police abuse (raised by Ricci's counsel) if the common law was not recognized. *Ricci*, 116 F.3d at 292 (rejecting as a histrionic "list of horribles" the possibility of governments using leg irons and shackles for misdemeanor arrests, or subjecting arrestees to strip and full body cavity searches). However speculative the list of potential police abuses may be, a well-documented and often overlooked threat is directly implicated by this case – the potential for abuse of occupational licensing laws at hands of self-serving licensing officials.

As discussed *infra*, occupational licensing laws often raise serious constitutional questions by interfering with a vital constitutional liberty: the right of individuals to

[4] The common law principle in this case also has the benefit of creating a bright line rule for government officials rather than the after-the-fact balancing test offered by the Seventh Circuit to determine the "reasonableness" of arrests for fine-only offenses.

pursue legitimate business professions free from excessive government interference.[5] Giving licensing officials the power of arrest only exacerbates these constitutional problems and creates a vehicle for intimidating citizens from exercising their rights and from challenging licensing requirements.

In this case, Randall Ricci was arrested for operating a business without a license. The Village of Arlington Heights's business license requirement is not unique. Today, occupational licensing laws are ubiquitous. Close to 500 occupations, covering approximately 10% of all jobs in this country, are currently licensed. Young, *The Rule of Experts: Occupational Licensing in America* 5 (1987); Bolick, *Grassroots Tyranny* 141-46 (1993).[6] Licensed

[5] *See, e.g., Truax v. Raich*, 239 U.S. 33, 41 (1915) ("the right to work for a living in the common occupations of the community is the very essence of the personal freedom and opportunity" protected by the Constitution); *Greene v. McElroy*, 360 U.S. 474, 492 (1959) ("the right to hold specific private employment and to follow chosen professions free from unreasonable government interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment"); *see also Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279-81 and n.10 (1985).

[6] The Institute for Justice last year issued reports on barriers to entrepreneurship, including occupational licensing laws, in Detroit, Boston, San Diego, Charlotte, Baltimore, San Antonio, and New York. *See* Berliner, *How Detroit Drives Out Motor City Entrepreneurs*; Berliner, *Running Boston's Bureaucratic Marathon*; Bolick, *Brightening the Beacon: Removing Barriers to Entrepreneurship in San Diego*; Bolick, *Entrepreneurship in Charlotte: Strong Spirit, Serious Barriers*; Bullock, *Baltimore: No Harbor for Entrepreneurs*; Matias, *Entrepreneurship in San Antonio: Much to Celebrate, Much to Fight For*; Mellor, *Is New York City*

occupations run the gamut from doctors and lawyers to barbers, beekeepers, and lightning rod salesmen.[7] Occupational licensing requirements are in addition to existing laws protecting the public from fraud and unsafe or defective products and services.[8] Typically, violations of such laws are misdemeanors that result in fines (although some laws carry possible jail sentences as well).

The economic literature is virtually unanimous in the view that most licensing laws go far beyond – and indeed are often entirely unrelated to – legitimate health and safety objectives of government. Indeed, the literature is overwhelmingly against licensure as a public policy.[9] As

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Killing Entrepreneurship? The Institute's city studies are available on-line at http://www.ij.org/publication_folder/Otherpub_folder/CitStud.html.

[7] California alone requires licenses for entry into 178 occupations, prompting Professor Leonard Levy to remark that "[a]bout the only people who are unlicensed in California are clergymen and university professors, apparently because no one takes them seriously." Levy, "Property as a Human Right," 5 Const. Commentary 169, 171 (1988).

[8] Disallowing arrests for violations of fine-only licensing ordinances would not in any way affect the ability of governments to enforce health and safety laws. Indeed, Arlington Heights did not claim it arrested Ricci to protect the public, but rather to fulfill its interests in making sure the licensing ordinance was obeyed and to complete the "necessary paperwork." *Ricci*, 116 F.3d at 291-92.

[9] *See, e.g.*, Friedman, *Capitalism and Freedom* (1962); Gellhorn, *Individual Freedom and Governmental Restraints* (1956); Rottenberg, "The Economics of Occupational Licensing," in *Aspects of Labor Economics* (1962); Rottenberg, ed., *Occupational Licensure and Regulation* (1980); Shimberg, *et al. Occupational Licensing: Policies and Practices* (1973); Stigler, "The Theory of

economics professor Simon Rottenberg concludes, most economists oppose licensure because it limits entry into the licensed occupations, raises the prices of services rendered in them, produces monopoly profits for some practitioners, does not clearly improve the mean quality of service and makes consumers worse-off by foreclosing lower-quality and lower price options for them. Rottenberg, *Occupational Licensure and Regulation, supra.*[10]

The economic literature against occupational licensure as a policy is in stark contrast to the legal and political climate, which stands foursquare in favor of licensing requirements. This clash between economic wisdom and political reality – and the origins and continuation of occupational licensing – is explained by Gellhorn:

> Licensing has only infrequently been imposed upon an occupation against its wishes. . . . Licensing has been eagerly sought [by the licensed occupation] – always on the purported ground that licensure protects the uninformed public against incompetence or dishonesty, but invariably with the consequence that members of the licensed group become protected against competition from newcomers. That restricting access is the real purpose, and not merely a side effect, of many if not most successful licensing

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Economic Regulation," Bell Journal of Economics and Management Science (Spring 1971); Young, *The Rule of Experts: Occupational Licensing in America* (1987).

[10] For a dissident economic viewpoint in support of licensure, *see* Leland, "Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards," Journal of Political Economy 1328-46 (December 1979). *But see* Young, *supra*, at 15-21 (discussing literature rebutting Leland's theory).

> schemes can scarcely be doubted. Licensing, imposed ostensibly to protect the public, almost always impedes only those who desire to enter the occupation or 'profession'; those already in practice remain entrenched without a demonstration of fitness or probity.

Gellhorn, "Abuse of Occupational Licensing," 44 *U. Chi. L. Rev.* 1, 11 (1976).[11] Not surprisingly, then, legislatures are almost entirely unpersuaded by the wealth of data and information on licensing, and continue to support calls by industries to institute or expand licensing.

The potential for abuse of occupational licensing laws is multiplied if enforcement officials possess the power of arrest for noncompliance. Enforcement of occupational licensing laws typically is given to licensing boards, often comprised of individuals who are members of the regulated industries themselves with a direct incentive to restrict competition and keep newcomers out of a profession. Reflecting the wisdom of the economists discussed above, albeit in a far more colloquial and

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[11] Economist Alex Maurizi further explains:

> Occupational licensing has been justifiable in the view of legislatures on the grounds that it protects the public interest; often, however, it is the producers of the good or service who present this argument to the state legislatures. This is hardly surprising, since the typical consumer is likely to suffer too small a wealth loss (in the form of higher prices) in the licensing of one more occupation . . . . The end result is the promotion of the interests of the producer group rather than those of the public.

Maurizi, "Occupational Licensing and the Public Interest," Journal of Political Economy (March-April 1974).

engaging manner, a former Virginia state official said of licensing boards: "The great truth that is never spoken directly, but anybody in the field with two bourbons in them will tell you, is that these boards work primarily to protect the practitioners and have little or nothing to do with protecting the public." *Quoted* in Isikoff, "Mustering the Political Will to Deregulate Va. Professions," *Washington Post*, February 7, 1983.[12]

What makes the power of licensing boards significant from a constitutional standpoint is their ability to wield civil and criminal penalties in enforcing legal cartels. Because of the economic protectionism and inherent incentives to restrict competition at the heart of most licensing schemes, the temptation to expand the use of arrests will invariably prove irresistible. This is especially true if governments can justify warrantless arrests on

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[12] It has also been repeatedly observed that occupational licensing laws have a devastating impact on people outside the economic mainstream, particularly minorities and the poor. Economist Walter Williams argues that many licensing statutes "discriminate against certain people," particularly "outsiders, latecomers and [the] resourceless" among whom members of minority groups are "disproportionately represented." Williams, *The State Against Blacks* xvi (1982); *see also* Institute for Justice City Studies, *supra* (documenting numerous licensing laws that work to the economic disadvantage of the poor in inner-city neighborhoods). This Court first recognized in *Yick Wo v. Hopkins*, 118 U.S. 356 (1996) that even facially neutral licensing laws can be deliberately used against racial minorities. *See also* Bernstein, "Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African Americans," 31 San Diego L. Rev. 89 (1994) (containing numerous historical examples of licensing laws being used against the interests of minorities).

such thin reeds as the need to "ensure compliance" with an ordinance and to complete the "necessary paperwork" like Arlington Heights did in the instant case. It is thus imperative that constitutional guarantees, including the common law prohibition of arrests for fine-only violations, be vigorously enforced in this arena.

Abuse of the criminal process by licensing authorities is not confined to the realm of sophisticated economic theory. Such abuses are well-documented in recent battles between licensing officials and economic outsiders. For instance, a black barber, Garland Allen, was arrested in Lebanon, TN in July 1995 in the shop where he had worked since he was a little boy. As he told the *Nashville Banner*, when he was young, there was no barber school for blacks in his area, even in Nashville, so he never obtained a license from the barber board. Woods, "Barber Caught in State's Cross Hairs; Regulators Demand Veteran Haircutter Get Proper License," *The Nashville Banner*, August 26, 1997. This incensed a rival barber, who turned him in to the Tennessee Board of Barber Examiners. The Board directed the police to arrest Mr. Allen and insisted that the local district attorney prosecute the case.[13] A grand jury refused to indict the well-loved barber. But that did not stop Evelyn Griffin, the barber board's chief administrator who said, "That grand jury made me mad. . . . We'll probably have him arrested. Why should

[13] The Board also insisted that Mr. Allen obtain a barber's license to remain in business, which would have required him to take off approximately nine months from his shop and pay close to $5,000 – all to learn a trade he has been practicing for over 30 years.

this one man be allowed to operate without a license?" *Id.*[14]

The Institute for Justice is also investigating the arrests of limousine drivers in Las Vegas, Nevada that have occurred over the past few months. These drivers have been handcuffed (causing injury in some instances) and detained for hours before being charged with driving without a limousine license. The limousine industry in Las Vegas has been controlled by a handful of owners for approximately the last 30 years. All of the licensed limousine companies are operated by these organizations, and only a few new licenses have been issued during that time permitting only severely limited service. In New York City, licensed van drivers have been the subject of a campaign of police harassment due to their competition with government transportation authorities. *See, e.g., Manti v. New York City Transit Authority*, 568 N.Y.S.2d 16 (App. Div. 1991) (denying motion to dismiss section 1983 suit brought by van drivers against efforts by city to "drive plaintiffs out of business").

Also in New York, street artists were routinely arrested for not having a license: "Between 1993 and 1996 more than 400 New York City artists were handcuffed and arrested for displaying or selling original paintings,

[14] The Garland Allen case was eventually resolved due to a settlement brokered by the Institute for Justice. Mr. Allen performed a haircut before members of the barber board (to ensure that he in fact did know how to cut hair) and agreed to submit to annual inspections of his business. Otherwise, he continues to happily ply his trade to his loyal customers at his People's Barber Shop without fear of arrest and prosecution.

photographs, sculptures, and limited edition prints on the street." "Guiliani Administration Appeals Street Artist Case to U.S. Supreme Court," *M2 Presswire*, February 26, 1997. These arrests were primarily a tool of abuse and harassment of the artists' First Amendment rights, for not one of the artists' cases was ever brought to trial, yet "the City systematically destroyed the thousands of works of art it confiscated." *Id.* The artists eventually filed a constitutional challenge to the City's actions. The arrests and destruction of property only ended when the United States Court of Appeals for the Second Circuit ruled that the City's requirement that the artists be licensed in order to sell their artwork in public spaces constituted an unconstitutional infringement of their First Amendment rights. *Bery v. City of New York*, 97 F.3d 689 (2d Cir.), *cert. denied*, 117 S.Ct. 2408 (1997).

As both *Manti* and the artist cases from New York compellingly demonstrate, many licensing laws and their application raise serious constitutional concerns.[15] In this

[15] Challenges to unreasonable licensing laws and prohibitions on an individual's right to pursue the occupation of one's choice have proliferated in recent years, with some success. *See Brown v. Barry*, 710 F. Supp. 352 (D.D.C. 1989) (striking down prohibition on ability of shoeshiners to obtain a license to operate on District of Columbia streets); *Santos v. City of Houston*, 852 F. Supp. 601 (S.D. Tex. 1994) (declaring prohibition on jitney service unconstitutional under due process and equal protection clauses of the U.S. Constitution); *Cornwell v. California Board of Barbering and Cosmetology*, 962 F. Supp. 1260, 1277 (S.D.Cal. 1997) (denying government's motion to dismiss constitutional challenge to application of cosmetology licensing law to African hairbraiders); *but see Jones v. Temmer*, 829 F. Supp. 1226 (D.Colo. 1993) (granting motion to dismiss lawsuit challenging the State of Colorado's prohibition on the granting of new taxicab licenses in Denver).

case, the Court need not address the constitutionality of Arlington Heights's licensing law or any other licensing requirement. This Court can ensure, however, that licensing laws and myriad other minor laws and regulations do not become a tool of abuse and oppression at the hands of self-serving administrative boards and agencies.

CONCLUSION

For the foregoing reasons, *amicus curiae* Institute for Justice respectfully requests that this honorable Court reverse the opinion below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RANDALL RICCI,

Petitioner,

—v.—

VILLAGE OF ARLINGTON HEIGHTS,
A MUNICIPAL CORPORATION,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of these principles, the ACLU has appeared before this Court in numerous Fourth Amendment cases, both as direct counsel and as *amicus curiae*. The ACLU of Illinois is one of its statewide affiliates. Because this case addresses an important Fourth Amendment question, its proper resolution is a matter of substantial concern to the ACLU and its members.

STATEMENT OF THE CASE

Illinois law authorizes peace officers to arrest a person without a warrant whenever the officer "has reasonable grounds to believe that the person is committing or has committed an offense." 725 Ill. Comp. Stat. 5/107-2(1)(c) (1993).[2] Pursuant to this authority, the Village of Arlington Heights adopted a policy of arresting anyone suspected of violating the provisions of the municipal code, allegedly to allow processing and paperwork to be conducted in the police station. *Ricci v. Arlington Heights, Ill.*, 116 F.3d 288, 289 (7th Cir. 1997).

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Although the Illinois statute on its face appears to authorize custodial arrest only for criminal "offenses," the Illinois Supreme Court has interpreted this term broadly to include violation of a municipal ordinance, even though such ordinances are tried and reviewed as civil proceedings. *People v. Edge*, 406 Ill. 490, 94 N.E.2d 359, 363 (1950).

On April 19, 1994, Detective Andrew Whowell and Officer Jerome Lehnert of the Arlington Heights Police Department arrested petitioner Randall Ricci for operating a business without a license, a violation of Arlington Heights Code of 14-3002 that is punishable only by a fine. Ricci's business, Rudeway Enterprises, conducted advertising and raised funds for an Illinois labor union, the Combined Counties Police Association. Whowell and Lehnert asserted that they had received complaints from some targets of Ricci's campaign, investigated and discovered that there was an outstanding arrest warrant against one of Ricci's employees, and also that no license had been issued for the business. 116 F.3d at 289.

This information was never presented to a magistrate and no arrest warrant was ever issued against Ricci. Acting on their own, the officers nevertheless entered Ricci's business premises, arrested his employee, and searched Ricci's business papers for evidence to put him out of business.[3] During the course of these activities, they asked Ricci if he had a license to operate the business. When he confirmed that he did not, Ricci was taken into custody and transported to the Arlington Heights police station where he was locked in an interview room for approximately one hour while the officers completed an arrest sheet and a complaint. Ricci was then released on a recognizance bond. While he was in custody, his wife obtained the requisite business license and, when his case came to court, the charge was dismissed.

Ricci then brought an action under 42 U.S.C. §1983, alleging that the Village of Arlington Heights and the two arresting officers had violated his Fourth Amendment rights. The district court denied defendants' motion for summary

[3] The district court deemed this fact admitted, *Ricci v. Village of Arlington Heights, Ill.*, 904 F.Supp. 828, 830 n.2 (N.D. Ill. 1995).

judgment on Ricci's claim that he had been subjected to an unconstitutional search of his business papers, finding that the complaint stated a triable claim,[4] but granted summary judgment to defendants on the claim of illegal arrest, reasoning that this Court had not yet held that a non-forcible arrest outside of the home might be unreasonable even if based on probable cause. 904 F.Supp. at 832. The Seventh Circuit affirmed this decision, holding the arrest valid because it was based on probable cause and conducted pursuant to the authority of an Illinois statute. 116 F.3d 288.

SUMMARY OF ARGUMENT

1. The Fourth Amendment prohibits custodial arrest for fine-only offenses in the absence of exigent circumstances. The Seventh Circuit is incorrect in asserting that any arrest may be regarded as reasonable as long as it is based on probable cause and authorized by a statute. 116 F.3d at 290. This Court has in the past found statutes purporting to authorize arrests to violate the Fourth Amendment. *See, e.g., Payton v. New York*, 445 U.S. 573 (1980). What is "reasonable" under the Fourth Amendment must be determined by a balancing test, weighing the relative intrusion against the state's legitimate needs. *United States v. Place*, 462 U.S. 696, 703 (1983); *Tennessee v. Garner*, 471 U.S. 1 (1985).

Custodial arrest is highly intrusive, carrying with it the right to search a suspect and his or her vehicle incident to the arrest, to use some degree of necessary force to effect the arrest, to transport the suspect to the police station, to handcuff, book and fingerprint the suspect, to detain the sus-

[4] 904 F.Supp. at 831. The Village subsequently settled this claim; Ricci dropped his claim that there had been no probable cause for his arrest. *See Ricci v. Arlington Heights, Ill.*, 116 F.3d at 289.

pect for a period of time (presumably up to 48 hours) before presenting the suspect to a magistrate, and to maintain a record of the arrest even if the charges are ultimately not proved.

On the other side of the balance, the state ordinarily has no real need to take an individual into custody for a fine-only offense. The common law authorized custodial arrests for breaches of the peace, not for what are essentially civil, regulatory offenses. The laws of most states, unlike the Illinois statute in question, limit the authority of the police to arrest for such minor, essentially civil offenses as violations of a municipal code's licensing rules, often requiring use of a summons procedure where there are no exigent circumstances.

The legislature's choice not to impose any jail time for a code violation is the best indication of the state's level of interest in taking custody of individuals who violate such prohibitions. *Welsh v. Wisconsin*, 466 U.S. 740 (1984). In other areas of constitutional interpretation, the Court has deferred to the legislature's classification of offenses as fine-only or not. *See Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Baldwin v. New York*, 399 U.S. 66 (1970). Taking an individual into custody for an offense for which no jail time is provided amounts to an unauthorized punishment, *cf. Bearden v. Georgia*, 461 U.S. 660, 667-68 (1983); *Tate v. Short*, 401 U.S. 395 (1971), to be imposed at the whim of the police, when the legislature has already determined such punishment to be disproportionate to the offense.

Prohibiting custodial arrest for fine-only offenses in the absence of exigent circumstances would provide a clear, convenient and understandable bright-line rule for courts and police to follow, respecting a line created by the legislature, rather than subjecting each individual arrest to after-the-fact scrutiny by the courts. There is no occasion in this case to

decide what exigent circumstances might justify a custodial arrest for a fine-only offense. Petitioner Ricci's arrest must be considered unreasonable because the police made absolutely no claim of any particular need to arrest him; they claimed that municipal policy was to routinely arrest everyone who violated municipal code provisions, primarily for reasons of their own administrative convenience.

2. Even if custodial arrest for a fine-only offense in these circumstances were not considered to be *per se* unreasonable, the officers should have obtained an arrest warrant before arresting petitioner. The common law permitted officers to arrest without a warrant for breaches of the peace committed within their presence. *See, e.g.*, 1 James F. Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 193 (London, MacMillian 1883). Most state statutes continue to restrict the power to arrest, usually requiring arrest warrants for misdemeanors committed outside the officer's presence, except in extenuating circumstances. In *United States v. Watson*, 423 U.S. 411 (1976), the Court held that the Fourth Amendment incorporates the common law on warrantless arrests for felonies and, in *dicta*, stated that the requirement of an arrest warrant would also be excused for misdemeanors committed in the presence of the officer. The "presence" requirement of *Watson* should be interpreted to embrace the common law's traditional rule limiting warrantless misdemeanor arrests to breaches of the peace. The Seventh Circuit's formalistic view that a suspect's admission satisfies the presence requirement, 116 F.3d at 289, misses the point of the warrant requirement.

While the existence of probable cause may not have been doubtful in Ricci's case, it will be in others. In the absence of a warrant requirement, it is too easy for the police to use the blanket authority Illinois law confers to arrest for even the most trivial offense, with its concomitant power to search people and their cars, as license to trawl. Because

the Court decided not to examine the subjective motivations of the police in using their search and seizure powers, in *Whren v. United States*, 517 U.S. __, 116 S.Ct. 1769 (1996), objective limitations on the power to arrest are essential, as the common law has long recognized.

ARGUMENT

I. CUSTODIAL ARREST FOR A FINE-ONLY OFFENSE, IN THE ABSENCE OF EXIGENT CIRCUMSTANCES, IS AN UNREASONABLE SEIZURE WITHIN THE MEANING OF THE FOURTH AMENDMENT

A. The Intrusiveness Of A Custodial Arrest Outweighs The State's Interests In Conducting Such Arrests For Fine-Only Offenses

When petitioner Ricci was transported to the police station, he was not only seized within the meaning of the Fourth Amendment, he was arrested. *See Dunaway v. New York*, 442 U.S. 200, 213-14 (1979). Because this Court has always recognized that custodial arrest is the gravest intrusion on an individual's liberty and privacy, it has strictly observed the requirement that any arrest must be based on probable cause, *id.* at 208. The Court has also found arrests to be unreasonable, even when based on probable cause, in a variety of cases, sometimes requiring arrest warrants as a precondition to a valid arrest. *See Payton v. New York*, 445 U.S. 573; *Welsh v. Wisconsin*, 466 U.S. 740 (warrant for home arrest required for misdemeanors as well as felonies); *see also Steagald v. United States*, 451 U.S. 204 (1981), and sometimes imposing limitations on the method of arrest, *see Tennessee v. Garner*, 471 U.S. 1 (limitation on use of deadly force in arrest); *Wilson v. Arkansas*, 514 U.S. 927 (1995) (knock-and-announce limitation on execution of warrants).

As the district court below observed, this Court has not yet addressed the general question of what limitations the Fourth Amendment imposes on the power to arrest for minor offenses, 904 F.Supp. at 832, although some individual Justices have expressed concern about the need to limit the power to arrest under such circumstances. *See Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973)(Stewart, J., concurring)("a persuasive claim might have been made . . . that the custodial arrest of petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments"); *Robbins v. California*, 453 U.S. 420, 450 n.11 (1981)(Stevens, J., dissenting); *cf. Maryland v. Macon*, 472 U.S. 463, 471 (1985)("We leave to another day the question whether the Fourth Amendment prohibits a warrantless arrest for the state law misdemeanor of distribution of obscene materials").[5]

The "key principle" of the Fourth Amendment's guarantee of reasonableness is "the balancing of competing interests," *Tennessee v. Garner*, 471 U.S. at 8, citing *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981). In numerous cases, this Court has followed the admonition that, to determine the constitutionality of a seizure, "[w]e must balance the nature and quality of the intrusion on the individual's

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[5] The Court has left this question open for so long that treatise writers have taken to asserting, only on the basis of the Court's inaction, that the requirements of the common law, like the requirement that an arrest be conducted only for an offense committed within the officer's presence, are not part of the Fourth Amendment. *See, e.g.*, Wayne R. LaFave, SEARCH AND SEIZURE §5.1(c) at 23 (3d ed. 1996); *Higbee v. City of San Diego*, 911 F.2d 377, 379 n.2 (9th Cir. 1990).

Even if they do not simply assume this to be true, some of the lower courts, like the district court below, have preferred to await the Supreme Court's lead rather than engaging in thorough analysis of what the Fourth Amendment requires. *See, e.g., Fisher v. Washington Metropolitan Area Transit Auth.*, 690 F.2d 1133, 1139 n.6. (4th Cir. 1982).

Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place*, 462 U.S. at 703; *see also Tennessee v. Garner*, 471 U.S. at 8; *Winston v. Lee*, 470 U.S. 753, 760 (1982); *United States v. Hensley*, 469 U.S. 221, 228 (1985); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-62 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 882-84 (1975); *Payton v. New York*, 445 U.S. at 603 (Blackmun, J., concurring). As these cases show, the Court has often preferred to examine the balance of such factors on a categorical basis, rather than on a case-by-case basis, particularly where it is possible to articulate a general rule which will then be subject to appropriate exceptions where exigent circumstances exist. In *Payton*, for example, the Court created a general rule, and examined the scope of the permissible exceptions in the subsequent case of *Welsh v. Wisconsin*, 466 U.S. 740. *See also Wilson v. Arkansas*, 514 U.S. 927 (general rule with exception developed in *Richards v. Wisconsin*, 520 U.S. __, 117 S.Ct. 1416 (1997)).[6] Thus, the appropriate inquiry focuses not only on what happened to petitioner Ricci, but on the interests generally or potentially at stake during any custodial arrest for a fine-only offense.

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[6] The Seventh Circuit quoted *dicta* from *Whren v. United States*, 116 S. Ct. at 1776, disavowing the need to engage in any balancing analysis in cases where an arrest is based on probable cause. 116 F.3d at 291. Treating that *dicta* as dispositive in this case would be to assume a decision on an important open question without ever directly addressing it. The Court used to declare that it had never "invalidated an arrest based on probable cause because the officers failed to secure a warrant," *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975), and that probable cause was thus the only requirement for a valid arrest. *See also Chimel v. California*, 395 U.S. 752 (1969). Nevertheless, the Court in *Payton* and subsequent cases found an arrest warrant to be required in some circumstances.

The Court has treated arrest as a bright-line category with many consequences. Incident to any lawful arrest, the Court has held that police, with no additional showing, have the power to conduct a full search of the individual being arrested, including containers on their person, *United States v. Robinson*, 414 U.S. 218, 221-22 (1973), even for minor offenses and where there is no evidentiary purpose, *Gustafson v. Florida*, 414 U.S. 260 (driving without a license), and to search the passenger compartment, including containers, of an arrestee's vehicle, *see New York v. Belton*, 453 U.S. 454 (1981). The arrestee may be publicly humiliated by being led away by the police, and then frightened by being transported to the stationhouse, possibly in handcuffs, where he or she may be booked and fingerprinted, and then detained without seeing a magistrate possibly for up to 48 hours. *See County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Petitioner Ricci was held for only one hour; others less fortunate could be held for longer, particularly if they are unable to secure bail or post a demanded bond.[7] In addition to the serious intrusion on the arrestee's liberty and dignity, an arrest can continue to compromise privacy interests. Even in cases resulting in acquittal or dismissal, arrest records may be maintained and disseminated, further damaging the individual's reputation. *See Paul v. Davis*, 424 U.S. 693 (1976); Donald L. Doernberg & Donald H. Zeigler, "Due Process Versus Data Processing: An Analysis of Computerized Criminal History Information Systems," 55 N.Y.U. L.Rev. 110, 1114 (1980).

The state certainly has an interest in assuring a defendant's presence at trial, but that interest can ordinarily be satisfied in fine-only cases by issuing a summons for a code

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[7] This practice would have particularly severe and potentially unconstitutional consequences for poor people. *See Tate v. Short*, 401 U.S. 395; *see* pp.21-22, *infra*.

violation.[8] The less serious the offense, the less likely a defendant is to abscond. In petitioner's case, the police did not express any fear that he would evade apprehension, or that arrest was necessary in order to prevent him from continuing his violation. Petitioner's wife promptly obtained the required license and corrected the violation. Petitioner did not pose any danger to anyone's safety, or to anyone's property. It was not necessary to transport petitioner to the stationhouse so that forms could be filled out by the police.[9] The record suggests that the police did not feel the need to have petitioner submit to a full booking procedure, and only kept him for one hour. *See* 116 F.3d at 289. The state's legitimate interests in obtaining background and identification information, filling out forms, and assuring that petitioner would be present for trial could easily have been served through a summons procedure. The police did not do anything at the stationhouse that they could not have done at petitioner's place of business. There was simply no need for the arrest.

Conversely, an exigent circumstances exception is sufficient to deal with those cases where a state does have a legitimate reason to arrest an individual for a fine-only offense, either because the individual is threatening a breach of the peace, perhaps, or seems likely to abscond. *See* Thomas R. Folk, "The Case for Constitutional Constraints

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[8] *See* ALI Model Code of Pre-Arraignment Procedures §120.2 (1975); Barbara C. Salken, "The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses," 62 Temple L.Rev. 221, 266-69 (1989).

[9] As Judge Easterbrook has observed: "If the police choose to perform time-consuming tasks after an arrest, perhaps they must do so on their own time rather than the suspect's, issuing a citation rather than keeping the suspect locked up in the interim." *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 437 (7th Cir. 1986).

Upon the Power to Make Full Custody Arrests," 48 U.Cin. L.Rev. 321 (1979)(arguing that custodial arrest for minor offenses should be confined to these situations). What exigent circumstances would justify a custodial arrest for a fine-only offense is not a question that arises in this case, however, because there was no claim of exigency with respect to petitioner Ricci's arrest and no basis for any such claim.

B. Common Law Tradition And The Consensus Of The States Support Prohibition Of Custodial Arrest For Fine-Only Offenses

This Court has often noted that the "Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Carroll v. United States*, 267 U.S. 132, 149 (1925). This is not a case where logic must defer to history, for logic is supported by history. At common law, a summons procedure rather than custodial arrest was used for minor offenses not constituting a breach of the peace. *See* Salken, *supra*, at 258-59 and authorities cited therein. Warrantless arrest was authorized only for "misdemeanors" that constituted a breach of the peace and occurred in the officer's presence. *See* Stephen, *supra* (London, MacMillian 1883)("The common law did not authorise the arrest of persons guilty or suspected of misdemeanours, except in cases of an actual breach of the peace either by an affray or by violence to an individual"); 1 Joseph Chitty, A PRACTICAL TREATISE ON THE CRIMINAL LAW 15 (1816) (Garland Publishing, Inc. 1978)("no person can, in general, be taken into custody without warrant, for a mere misdemeanour unattended with violence, as perjury or libel"); 4 William Blackstone, COMMENTARIES *289; Matthew Hale, PLEAS OF THE CROWN: A METHODICAL SUMMARY 92

(1678)(P. R. Glazebrook ed., Professional Books Ltd. 1972)("in case of any other breach of the peace, the Constable may imprison the party in the Stocks, in the Goal [sic], or in his House, till he can bring him before a Justice of the Peace"); Edward C. Fisher, LAWS OF ARREST 125 (1967); Wayne R. LaFave, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 17 (1965); William A. Schroeder, "Warrantless Misdemeanor Arrests and the Fourth Amendment," 58 Mo. L.Rev. 771, 774-75 (1993).

The misdemeanors for which common law allowed custodial arrest were serious offenses, including assaults and other dangerous and disruptive acts, or public disturbances. *See* Horace L. Wilgus, "Arrest Without a Warrant," 22 Mich.L.Rev. 541, 572-77 (1923-24)(listing offenses covered). As new offenses were created and the domain of the criminal law expanded, some statutes eroded the common law and extended the arrest authority to what Wilgus termed "public torts," *id.* at 576-77, and even to regulatory offenses like petitioner's failure to obtain a license. *See* Edward C. Fisher, LAWS OF ARREST 128 (1967); Schroeder, *supra*, at 775; Sam B. Warner, "Uniform Arrest Act," 28 Va.L.Rev. 315, 331-36 (1942). It is these new regulatory and quasi-civil offenses, mostly unknown to the common law, like petitioner's infraction, that are likely to be punishable only by fine.[10]

Most contemporary statutes share the approach of the common law, seeking to limit custodial arrest for non-felonies to instances where there is an actual need to arrest. Several states have explicitly codified the common law requirement that warrantless arrests may only be conducted

[10] *See* Francis H. Bohlen, "Arrest With and Without a Warrant," 75 U. Pa. L.Rev. 485, 491 (1927)(finding "appalling" the notion that the traditional common law power to arrest for breaches of the peace might be expanded to municipal ordinance violations).

for misdemeanors occurring in the presence of the officer if they are breaches of the peace.[11] The vast majority of other states retain the presence requirement that Illinois has abandoned,[12] limiting exceptions to that requirement to situations where immediate arrest is deemed necessary.[13] The ubiquitous presence requirement, read in light of the com-

[11] *See* Miss. Code Ann. §99-3-7(1) (Supp. 1997); W. Va. Code §62-10-6 (1997)(limitation on constables, not sheriffs). Some statutes limit the right to arrest to "public offenses" committed within the officer's presence, *see* Ala. Code §15-10-3(a)(1) (1995)("public offense" or "breach of the peace"); Ark. Code Ann. §16-81-106(b)(2) (Michie Supp. 1997); Cal. Penal Code §836(a)(1) (West Supp. 1998); Idaho Code Ann. §19-603(1) (1997); Iowa Code Ann. §804.7(1) (West 1994); Minn. Stat. Ann. §629.34(c)(1) (West 1983); N.D. Cent. Code §29-06-15(1)(a) (Supp. 1997); Okla. Stat. Ann. tit. 22, §196(1) (West Supp. 1998); S.D. Codified Laws §23A-3-2 (Michie 1988); Tenn. Code Ann. §40-7-103 (Supp. 1996)("public offense" or "breach of the peace"); Utah Code Ann. §77-7-2(1) (1995).

[12] *See* statutes cited in nn.15-16, *infra*. Other than Illinois, only Hawaii, Haw. Rev. Stat. §803-5 (1993), Rhode Island, R.I. Gen. Laws §12-7-3 (1994), and Wisconsin, Wis. Stat. Ann. §968.07(d) (West 1996), have statutes wholly eliminating the presence requirement. Rhode Island limits warrantless arrests in another manner -- by requiring the officer to have reasonable grounds to believe the person cannot be arrested later, or may cause injury or property damage, R.I. Gen. Laws, *id.* Wisconsin apparently excludes municipal code violations, which are not considered to be "crimes," *see* Wis. Stat. Ann. §66.12(1)(a) (West Supp. 1997); Wis. Stat. Ann. §939.12 (West 1996); *State ex rel. Prentice v. County Ct., Milwaukee Cty.*, 70 Wis.2d 230, 234 N.W.2d 283, 288-89; (1975). Hawaii, with its unique history, did not share the common law tradition of the other states.

Several other states invoke the presence requirement and then seem to eviscerate it through blanket exceptions, *see* Ariz. Rev. Stat. Ann. §13-3883(2), (4) (West Supp. 1997); La. Code Crim. Proc. Ann. art. 213(1), (3) (West 1991); Mo. Ann. Stat. §544.216 (West Supp. 1998).

[13] *See* nn.15-16, *infra*.

mon law's concern about disturbances of the peace,[14] tends to limit the custodial arrest power to public offenses (since officers will generally be making their observations in public), where the officer may determine that there is a need to remove the offender from the scene of the offense.

Moreover, even where these "presence" statutes do not specifically mention breach of the peace, they typically incorporate other constraints on the officer's discretion. Some permit warrantless arrests only for designated offenses committed outside the officer's presence, usually more serious misdemeanors entailing violence or a threat of violence.[15]

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[14] The presence requirement must be defined in light of the common law's additional concern about limiting arrests for offenses that do not breach the peace. *See* p.26, *infra*.

[15] *See* Ala. Code §15-10-3 (1995); Alaska Stat. §12.25.030(a) (Michie 1996); Ark. Code Ann. §16-81-106(b)(2) (Michie Supp. 1997); Cal. Penal Code §836(c)-(d) (West Supp. 1998); Del. Code Ann. tit. 11, §1904(a)(4)-(6) (1995); Fla. Stat. Ann. §901.15(6)-(8) (West Supp. 1998); Ga. Code Ann. §17-4-20(a) (1997); Idaho Code Ann. §19-603(6) (1997); Ind. Code Ann. §35-33-1-1(a)(3), (5) (Michie 1994); Kan. Stat. Ann. §22-2401(c)(2)(C) (1995); Ky. Rev. Stat. Ann. §431.005(1)(e), (2)(a) (Michie Supp. 1996); Me. Rev. Stat. Ann. tit. 17-A, §15(1)(A)-(B) (West Supp. 1997); Mass. Ann. Laws ch. 276, §28 (West Supp. 1997); Mich. Comp. Laws Ann. §764.15(1)(m) (West 1982); Minn. Stat. Ann. §629.34(1)(c)(5) (West Supp. 1998); Miss. Code Ann. §99-3-7(3) (Supp. 1997); Neb. Rev. Stat. §29-404.02(3) (1995); Nev. Rev. Stat. Ann. §171.124(b) (Michie 1997); N.H. Rev. Stat. Ann. §594.10(I)(b) (Supp. 1997); N.M. Stat. Ann. §31-1-7(A) (Michie Supp. 1996); N.Y. Crim. Proc. Law §140.10(b) (McKinney Supp. 1997)(misdemeanors, not offenses); N.C. Gen. Stat. §15A-401(d) (1997); N.D. Cent. Code §29-06-15(e), (g) (Supp. 1997); Ohio Rev. Code Ann. §2935.03(B)(1) (Anderson Supp. 1996); Okla. Stat. Ann. tit. 22, §196(6) (West Supp. 1998); Or. Rev. Stat. §133.310(3) (1995); S.D. Codified Laws §23A-3-2.1 (Michie Supp. 1997); Tex. Crim. P. Code Ann. §14.03(2)-(4) (West Supp. 1998); Vt. R. Crim. P. 3(a)(2)(C) (Supp. 1997); Va. Code Ann. §19.2-81 (Michie Supp. 1997); Wash. Rev. Code Ann. §10.31.100(1)-(2)
(continued...)

Other state statutes prescribe more generalized criteria for determining whether an immediate arrest is necessary. For example, these statutes frequently require a reasonable belief that the suspect: (1) will not be apprehended unless immediately arrested, (2) may cause personal injury or property damage, (3) will destroy evidence, or (4) will persist in refusing to identify himself or herself and therefore cannot be issued a summons.[16] While these statutes do impose some control on police discretion, they nevertheless vastly expand the authority conferred by common law, because the "offenses" or "misdemeanors" included cover a vast array of new quasi-civil matters. At least eight states' statutory schemes appear to have addressed this problem head-on, categorically prohibiting custodial arrests for fine-only offenses.[17]

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[15] (...continued)
(West Supp. 1998), or for dangerous traffic violations, like driving while intoxicated or reckless driving, *see* Mich. Comp. Laws Ann. §764.15(1)(h)-(i) (West Supp. 1997); N.J. Stat. Ann. §39:5-25 (West 1990); N.D. Cent. Code §29-06-15(1)(f) (Supp. 1997); Okla. Stat. Ann. tit. 22, §196(5) (West Supp. 1998); Or. Rev. Stat. §133.310(1)(d)-(g) (1995); Tenn. Code Ann. §40-7-103(6) (Supp. 1996); Wash. Rev. Code Ann. §10.31.100(3)-(4) (West Supp. 1998).

[16] *See, e.g.*, Del. Code Ann. tit. 11, §1904(a)(2) (1995); Kan. Stat. Ann. §22-2401(c)(2)(A)-(C) (1995); Me. Rev. Stat. Ann. tit. 17-A §15(1)(a)(5)-(8) (West Supp. 1997); Mont. Code Ann. §46-6-311(1) (1997); Neb. Rev. Stat. §29-404.02(2) (1995); N.H. Rev. Stat. Ann. §594.10(I)(c) (1986); N.C. Gen. Stat. §15A-401(b)(2)(b) (1997); R.I. Gen. Laws §12-7-3 (1994); Utah Code Ann. §77-7-2(3) (1995); Vt. R. Crim. P. 3(a)(3)-(4) (Supp. 1997); Wyo. Stat. Ann. §7-2-102(b)(iii) (Michie 1996); *see* ALI Model Code of Pre-Arraignment Procedure §120.1 (1975).

Some statutes require *both* particularly dangerous offenses and risk of flight, injury, etc., *see* D.C. Code Ann. §23-581(a)(1)(C) & (2) (1996); Md. Code Ann. art. 27 §594B(e) & (f) (1996).

[17] *See* Ala. Code §15-10-3 (1995); Ala. Code §13A-1-2(1)-(3) (1995);
(continued...)

These consistent attempts to circumscribe the arrest power bolster the conclusion that it is not reasonable within the meaning of the Fourth Amendment for a state to give vast and unchecked power to the police to arrest even for minor regulatory offenses. In fact, it was exactly such excessive delegations of authority that the Fourth Amendment was intended to prevent. It is by now familiar history that the framers' dismay at statutes granting general prerogatives to search and seize (like the writs of assistance) was one of the principal motivating factors, not only for the Revolution, but for the creation of the Fourth Amendment itself. *See* Nelson B. Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION at 13-78 (1937)(events during the thirty years preceding the drafting of the Fourth Amendment inspired the framers to elevate the principle of "reasonableness" to one of constitutional significance); *Payton v. New*

[17] (...continued)
Alaska Stat. §§12.25.030(1) & 11.81.900(b)(9), (b)(58) (Michie 1996); Del. Code Ann. tit. 11, §§1903(a) & 233(c), 4207 (1995); Ky. Rev. Stat. Ann. §§431.005(d) & 431.060(2)-(3) (Michie 1985); Me. Rev. Stat. Ann. tit. 17-A, §15(1)(B) (West Supp. 1997), & Me. Rev. Stat. Ann. tit. 17-A, §4-B(3) (West 1983); Pa. R. Crim. P. 101(2)(a),(c) (West 1997); 18 Pa. Cons. Stat. Ann. §106(b)(8) (West 1983); R.I. Gen. Laws §§12-7-3 & 11-1-2 (1994); S.D. Codified Laws §§23A-3-2(1) & 22-6-7 (Michie 1988). Only a handful of state statutes explicitly authorize custodial arrest for violation of a municipal ordinance, *see* Fla. Stat. Ann. §901.15(1) (West 1996); Mich. Comp. Laws Ann. §764.15(1)(a) (West Supp. 1997); Mo. Ann. Stat. §544.216 (West Supp. 1998); Ohio Rev. Code Ann. §2935.03(A) (Anderson Supp. 1996); others seem to allow for this possibility, *see, e.g.*, N.C. Gen. Stat. §§15A-401(b)(2)(b) & 14-4(a) (1997); while others appear to disallow custodial arrest for ordinance violations, *see* Ind. Code Ann. §34-4-32-2 (Michie 1986)(allowing brief detention, not arrest). For most states, it is impossible to determine on the basis of the state statutes alone whether custodial arrest would be permitted for fine-only offenses, or for municipal code violations generally.

York, 445 U.S. at 583-85. "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, in order to safeguard the privacy and security of individuals against arbitrary invasions." *Delaware v. Prouse*, 440 U.S. at 653-54. Thus, "standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the officer in the field be circumscribed, at least to some extent." *Id.* at 661. *See also Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973); *United States v. Martinez-Fuerte*, 428 U.S. at 559; *Camara v. Municipal Court*, 387 U.S. 527, 532-33 (1967)(all relating the Fourth Amendment's guarantee of reasonableness to the imposition of standards to guide and control police discretion).[18]

In the recent case of *Whren v. United States*, 116 S.Ct. 1769, the Court declined to examine whether detentions for traffic offenses were in fact pretexts to investigate suspected drug offenders, believing that it would be inappropriate as part of Fourth Amendment analysis to explore the subjective motivation of individual officers. The Court declared that it would, of course, be impermissible for officers to use their discretion to stop traffic offenders on the basis of an impermissible factor like race, *id.* at 1774, but relied on the Equal Protection Clause to provide protection against discrimina-

[18] In their depositions, the Arlington Heights officers claimed that it was Village policy to arrest offenders as a matter of routine, in order to process them at the stationhouse, Brief for Appellant at 12-13. If there were a mandatory policy to arrest all offenders, discretion would seem to be curtailed. However, the check on individual officers' discretion is illusory, because officers still have the power to decide to warn rather than arrest an offender. Furthermore, a policy subjecting all offenders, no matter how petty the offense, to mandatory arrest would be unreasonable overreaching under the Fourth Amendment because there would be no possible claim of necessity for every arrest.

tion in that context. The holding in *Whren* underscores the need for objective limitations on the arrest power like those embodied in the common law and the vast majority of state statutes. If a legislature may authorize custodial arrest for any offense at all, then the potential for abuse of discretion is magnified exponentially. Every jaywalker, every person who allows a business or professional license to expire, could be subjected to a search incident to arrest; every illegal parker could be subjected to a search of his or her person and car. The temptation to the police to trawl for drug offenders would be overwhelming, and without the justification in *Whren* of the need to stop motorists to investigate moving or traffic violations that might in fact pose a danger to others.[19]

Requiring the police in the absence of exigent circumstances to issue citations for minor, regulatory offenses rather than allowing them the power to arrest and search every municipal code violator would prevent widespread and inevitable problems of arbitrary and discriminatory enforcement from developing. Wayne R. LaFave, "'Case-by-Case Adjudication' Versus 'Standardized Procedures': The *Robinson* Dilemma," 1974 Sup.Ct.Rev. 127, 158, 162 (the most straightforward and most efficient control "in an area with a high potential for abuse" is to limit the circumstances under which an arrest is permissible.)

[19] *Whren* involved the power to stop, not arrest. However, moving violations frequently do entail the possible imposition of jail time. *See, e.g.*, 625 Ill. Comp. Stat. 5/11-501(c) (1993)(driving under the influence of alcohol).

C. Prohibiting Arrest For Fine-Only Offenses Is Consistent With General Principles Of Constitutional Interpretation

The courts could satisfy their responsibility to ensure that there are meaningful limits on police discretion to arrest by simply ruling that custodial arrest for minor offenses is allowed whenever the individual arrest is reasonable in light of all the facts -- a case-by-case approach that would include balancing the nature of the intrusion (including such facts as how many hours the suspect was actually held, whether handcuffs or shackles were used, whether the suspect was given food, etc.), and the state's interests, including an evaluation of the seriousness of the offense. On the other hand, ruling that it is generally unreasonable to arrest for a fine-only offense would allow the courts to avoid the unnecessary burden of evaluating each misdemeanor arrest individually, while taking account of each state's decision about what offenses are serious. As the Court has previously held, a state's decision to classify an offense as civil is the "best indication of the state's interest in precipitating an arrest, and is one that can be easily identified." *Welsh v. Wisconsin*, 466 U.S. at 754. *See generally* LaFave, "Case-by-Case Adjudication," *supra*.

The Seventh Circuit mischaracterized petitioner's claim in suggesting that petitioner wished only to insert severity of the offense as a factor for the courts to balance. 116 F.3d at 291. Using the legislature's own decision about the range of permissible punishment as the basis for circumscribing the arrest power respects the legislature's autonomy in an appropriate manner.[20] In interpreting other provisions of

[20] The Seventh Circuit was far too deferential to the state legislatures in declaring that any arrest based on probable cause is reasonable if the legislature of the jurisdiction in question has authorized it. 116 F.3d at

(continued...)

the Bill of Rights, the Court has declined to create its own definition of seriousness, instead relying on the legislature's determination that an offense should be punished only by a fine as dispositive of constitutional protections attaching to that offense. The Court has held, for example, that an individual has a right to counsel under the Sixth and Fourteenth Amendments only in connection with offenses that subject the individual to incarceration, *see Argersinger v. Hamlin*, 407 U.S. 25; *Scott v. Illinois*, 440 U.S. 367 (1979). The individual does not gain a right to counsel even if subjected to enormous fines, or other serious consequences not involving incarceration. *See Argersinger*, 407 U.S. at 44 (Powell, J., concurring)(observing that penalties other than incarceration may also be serious). Similarly, the right to a jury trial under the Sixth and Fourteenth Amendments is contingent on the legislature's determination of the level of punishment appropriate upon conviction of an offense, *Baldwin v. New York*, 399 U.S. 66, not on what offenses the courts consider "serious," and not on whether the legislature characterizes its offenses as "felonies" or "misdemeanors."

The Court adopted this approach recognizing that it would be difficult to rely on whether particular offenses are labeled as "felonies" or "misdemeanors," because definitions of these terms vary greatly in different states. Likewise, what is a "misdemeanor" in one state is a "petty offense" or

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[20] (...continued)
290. Legislatures do not have final power to decree that an arrest is reasonable (*see Payton*, *Welsh* and *Michigan v. DeFillippo*, 443 U.S. 31 (1979), for a few of the instances where the Court has invalidated state statutes purporting to authorize arrests), any more than they have the power to declare that a search or seizure is unreasonable within the meaning of the Fourth Amendment. *See, e.g., Oliver v. United States*, 466 U.S. 170 (1984), where the Court upheld a search as reasonable even though it was conducted in violation of state law.

"violation" in another. What is a "crime" in one state is a civil matter in others. In this context as in others, therefore, it would not be feasible to adopt a rule based on the level of offense instead of the level of punishment.[21]

The fine-only distinction also serves the important function of preventing unauthorized and disproportionate punishment for an offense. Once a legislature has decided not to allow any possibility of incarceration upon conviction of an offense, it should be impermissible for an individual who is only suspected of committing that offense to be locked up, even for 48 hours or less, at least in the absence of exigent circumstances. "Most reports of misdemeanors will not produce a sentence of custody . . . so a custodial arrest becomes a substantial part of the punishment." *Gramenos v. Jewel Companies, Inc*, 797 F.2d at 441. *See* Malcolm M. Feeley, THE PROCESS IS THE PUNISHMENT 46-47 (1979). It is not only unreasonable under the Fourth Amendment, but a denial of due process to allow detention at the sole whim of the police for an offense that could not have led to incarceration upon conviction. *Cf. Tate v. Short*, 401 U.S. 395; *Bearden v. Georgia*, 461 U.S. at 667-68 (if a state determines a fine to be the appropriate punishment for an offense, an individual may not be imprisoned for lacking the resources to pay); *Allen v. Burke*, No. 81-0040-A, slip op. at 4 (E.D. Va. June 4, 1981), *aff'd sub nom. Pulliam v. Allen*, 690 F.2d 376 (4th Cir.), *aff'd*, 104 S.Ct. 1970 (1984)(fundamental notions of fairness are offended "by subjecting a pretrial detainee, clothed in the presumption of innocence, to a greater punishment than he could receive after being found

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[21] This Court has previously held that a state legislature's own description of its statutes as being "criminal" or "civil" is not dispositive, *see Austin v. United States*, 509 U.S. 602 (1993); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), so attempting to define arrest authority on the basis of whether a state denominates an offense as "criminal" would also be unavailing.

guilty, solely because of inability to pay a money bond").

"[I]f a restriction or condition is not reasonably related to a legitimate goal . . . a court permissibly may infer that the purpose of the governmental action is punishment," *Bell v. Wolfish*, 441 U.S. 520, 539 (1979), and "under the Due Process Clause, a detainee must not be punished prior to an adjudication of guilt in accordance with due process of law," *id.* at 535. Because custodial arrest is not necessary to serve the state's legitimate interest in the ordinary fine-only offense, it functions as punishment.

II. WARRANTLESS ARRESTS FOR MINOR OFFENSES, IN THE ABSENCE OF EXIGENT CIRCUMSTANCES, ARE UNREASONABLE WITHIN THE MEANING OF THE FOURTH AMENDMENT

A. The Common Law And This Court's Prior Case Law Require Arrest Warrants For Misdemeanor Arrests Absent Certain Exigent Circumstances

At common law, as described above, warrantless arrests for misdemeanors were permitted only for breaches of the peace committed within the officer's presence.[22] *See* pp.11-12, *supra*. As one leading commentator has explained: "In such cases the arrest had to be made not so much for the purpose of bringing the offender to justice as in order to preserve the peace, and the right to arrest was accordingly limited to cases in which the person to be arrested was taken in the fact or immediately after its commission." Stephen, *supra*, at 193. The breach of peace requirement identified one type of exigency -- there was an immediate need to stop the offender from disturbing the peace -- while the presence requirement also served the additional function of assuring that officers only arrested suspects on the basis of reliable information *See Gramenos*, 797 F.2d at 441 (presence requirement reduces the likelihood of mistaken arrests).

Where there is no exigency, there is no need to dispense with the warrant requirement, as the common law recognized. This Court has consistently interpreted the Fourth Amendment's requirement of reasonableness as incorporating a preference for warrants. In Justice Jackson's classic statement,

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14 (1948).

There was no reason why the officers in this case could not have obtained a warrant. They knew before they went to petitioner's place of business that he was operating without a license; it can scarcely be claimed that this was an

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[22] The Seventh Circuit held that petitioner had waived an argument under the Fourth Amendment's Warrant Clause in this case by not having raised it in his brief, 116 F.3d at 291-92. Because petitioner's warrant and reasonableness arguments were intertwined in his brief to the Seventh Circuit, Brief for Appellant at 9, as they are in the first question on which this Court granted *certiorari* ("Does the Fourth Amendment's Reasonableness Clause incorporate common-law rule prohibiting warrantless arrests in misdemeanor cases that do not breach the peace?"), *amici* are addressing this point in the event the Court reaches the issue.

emergency or hot pursuit. The officers did not get a warrant because Illinois law, and their police department policy, had decreed that a warrant was unnecessary. But the legislature cannot forgive the warrant requirement any more than it can make a final decision about what arrests are reasonable. *See, e.g., Payton v. New York.*

In *United States v. Watson*, 423 U.S. 411, the Court held that the Fourth Amendment incorporates common law rules pertaining to warrantless arrest. Under *Watson*, felony arrests may be made without a warrant and without a particularized showing of exigent circumstances, even if the felony is not committed within the officer's presence, because of a conjunction of factors: (1) the common law had consistently allowed warrantless arrests for felonies; (2) virtually all of the states, in addition to Congress, allowed warrantless arrests for felonies; and (3) exigency could reasonably be presumed to exist in almost every case of felony arrest, thus justifying what is in effect a conclusive presumption of exigency. *Id.* at 418-22. Because the stakes are so high, there is a significant danger that the suspected felon will try to escape, possibly with injury to the officer or someone else. The nature of the crime for which the person is being arrested, often a serious crime of violence, feeds the assumption that it might be dangerous to leave the person at large while seeking a magistrate's review. Thus, the Court recognized a general exception to the warrant requirement not based on a showing of exigent circumstances.

Understanding that the balance of interests in misdemeanor cases is different, the *Watson* Court, in *dicta*, also stated that warrantless arrests are permitted for misdemeanors committed within the "presence" of the officer, describing this as the "ancient common law rule." *Id.* at 418.[23]

[23] It would seem, by negative implication, that arrest warrants are consti-
(continued...)

The Court was right to conclude that exigency cannot be presumed in misdemeanor arrests. First, because the stakes are far lower, there is less temptation to "elude justice by absconding," *see* Chitty, *supra*, at 14. There is also less justification for suspecting that an offender who has been running a business without a license will pose a danger to the officer or to the public. In short, there is no reason not to require the officer seeking to arrest for a misdemeanor to first obtain an arrest warrant in the ordinary case.

In *Payton*, the Court found a different balance when considering whether the Fourth Amendment requires arresting officers to obtain a warrant prior to an arrest at home: the common law was supportive, although somewhat ambiguous, and the states were divided (only 15 required arrest warrants for home arrests). 445 U.S. at 590-600. In this case, as in *Watson*, there is greater agreement among the common law and the states than there was in *Payton*. But unlike *Watson*, this consensus favors maintaining the warrant requirement rather than creating additional exceptions.

[23] (...continued)
tutionally necessary at least for offenses committed outside the presence of the officer. But, some readers of *Watson* seem to agree with the dissenters that "the Court, in the guise of 'constitutionalizing' the common-law rule, actually does away with it altogether, replacing it with the rule that the police may, consistent with the Constitution, arrest on probable cause anyone whom they believe has committed any sort of crime at all." *State v. Surdyka*, 492 F.2d 368 (4th Cir. 1974). This is an inaccurate reading of *Watson*.

B. Petitioner's Offense Does Not Fall Within An Exception To The Warrant Requirement

The Seventh Circuit ruled below that even if common law requirements were incorporated into the Fourth Amendment, petitioner's arrest should be considered constitutional because his offense was committed within the officers' "presence," 116 F.3d at 289. The Seventh Circuit's formalistic definition of presence fails to read the Court's *Watson dicta* in the context of its common law origins. The presence requirement is in part a guarantee of reliability, because the officer must rely on personal rather than second-hand observations. It is also an embodiment of the common law's concept of exigency -- something happens in the presence of the officer, who then judges whether there is a need to remove the offender from the scene, even if the offense is minor, perhaps to allow a cooling off period, or perhaps to prevent further disruption.[24]

Petitioner's warrantless arrest did not serve any purpose known to the common law. To argue that not having a license for a business is an offense that occurs within the officer's "presence" seems metaphysical. This is not the type of offense the common law had in mind when it created rules for breaches of the peace. To argue that this offense occurred within the officers' "presence" because petitioner admitted that he had no license, *id.* at 289, misses the point of the warrant requirement. The officers knew, before going to petitioner's place of business, that he had no license; they could have gone instead to obtain an arrest warrant if there had really been any good reason to take him into custody. Even in cases where there is an abundance of probable cause, it is axiomatic that a warrant is still necessary. *See, e.g., Johnson v. United States*, 333 U.S. 10.

Furthermore, even if the existence of probable cause was not questionable in petitioner's case, it will be in other cases; even if there were no legal questions posed as to whether petitioner's conduct actually violated a particular ordinance, such questions will arise in other cases. As Justice Jackson pointed out, it is the magistrate and not the officer in the field who should be making these judgments where at all possible. If an admission is sufficient to create an exception to the warrant requirement, then the police will be encouraged to avoid the magistrate, and go instead to the suspect to see if they can extract an admission of wrongdoing.

In most cases, custodial arrest is simply not justified for a minor, regulatory offense. In cases where there are truly exigent circumstances -- potential harm, defiance of legal process, *e.g.* -- the police will not be required to obtain an arrest warrant. If they wish to arrest a petty offender in a case where there are no exigent circumstances -- perhaps to make an example of him, or perhaps because they do not like him or the nature of his business -- the necessity of submitting their case to a magistrate may help to ensure that they do not deprive people of their liberty, privacy and dignity too lightly.

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[24] As described in nn.15-16, *supra*, almost all states' statutes retain the "presence" requirement but, like the *Watson dicta*, do not explicitly mention the common law's breach of the peace requirement. As one court observed: "These common-law exceptions to the general rule were based on the principle that the ordinary right of exemption from arrest, except upon warrant, should yield to public necessity . . . . As long as exceptions additional to those fixed by the common-law fall fairly within the principle from which the common-law exceptions arose, they are not subject to constitutional objection." *State v. Byrd*, 72 S.C. 104, 51 S.E. 542, 544 (1905).

How and why articulation of the breach of peace requirement disappeared from statements of the common law in this Court's case law and in so many state statutes is a story that has yet to be told in full. *See* Bohlen, *supra*, and sources cited at p.12, *supra*, for a partial account of this history.

Enlisting neutral and detached magistrates to screen searches or arrests is the traditional Fourth Amendment method of providing objective limits to police discretion. Court-imposed rules, whether rules of reason or bright-line rules like the fine-only limitation, are another. A third alternative is for the courts to insist that the legislatures provide meaningful guidelines and criteria to limit police discretion, as this Court has done in cases concerning inventory searches of impounded automobiles. *See Florida v. Wells*, 495 U.S. 1 (1990); *Colorado v. Bertine*, 479 U.S. 367, 375 (1987); *South Dakota v. Opperman*, 428 U.S. 364, 369, 372, 379 (1976).

Because the Illinois statute is unusual in its utter failure to provide guidelines or criteria for the exercise of the arrest power, even the latter approach would be an improvement. It is clear, however, which of these approaches would be most effective. Because the potential for abuse of discretion in this area is so vast, the Court should interpret the Fourth Amendment, consistent with its history, as prohibiting custodial arrests for fine-only offenses in the absence of exigent circumstances. At the very least, the Court should require peace officers to obtain an arrest warrant prior to arresting an individual for any offense not denominated a felony, in the absence of exigent circumstances. If the Court does not impose adequate objective limitations on the power to arrest, the standardless Illinois statute will undoubtedly engender even greater harm than the indignity suffered by petitioner Ricci.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

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Dated: February 23, 1998

No. 97-501

(13)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

RANDALL RICCI,
Petitioner,
v.
VILLAGE OF ARLINGTON HEIGHTS,
A MUNICIPAL CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment prohibits warrantless arrests for misdemeanors that do not involve a breach of the peace.

2. Whether an arrest that is supported by probable cause is per se unreasonable under the Fourth Amendment solely because the underlying offense is punishable by a fine and not by incarceration.

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INTEREST OF THE *AMICI CURIAE* [1]

Amici are organizations whose members include state, county and municipal governments and officials through-

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no

out the United States. *Amici* have a compelling interest in the legal issue presented in this case: whether the Fourth Amendment prohibits warrantless arrests for offenses committed in the presence of the arresting officers.

There are many recurring situations in which state and local government law enforcement officers must, if the law is to be enforced, have the authority to make warrantless arrests for offenses committed in their presence, even if the penalty for the offense is a fine. At the state level, the effective enforcement of a wide range of essential motor vhicle laws would be undermined by the adoption of petitioner's position. At the municipal level, the meaningful exercise of the police power—which "extends to all the great public needs," *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1910) (Holmes, J.)—would be seriously compromised. Because municipal governments bear the primary responsibility for enacting and enforcing laws to protect the great public needs of our cities, towns, and counties, they must have the corresponding ability to enforce these laws. Consequently, adoption by this Court of the position of petitioner and his *amici* "would constitute an intolerable handicap for legitimate law enforcement." *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975).

Because of the importance of the questions presented to *amici* and their members, *amici* respectfully submit this brief to assist the Court in resolving this case.

STATEMENT

Amici adopt respondent's statement.

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counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici* or their members, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

I. Contrary to petitioner's contention, the Fourth Amendment does not incorporate the ancient common law rule prohibiting warrantless arrests for misdemeanors that do not involve a breach of the peace. This Court's Fourth Amendment cases "have not 'simply frozen into constitutional law those enforcement practices that existed at the time of the Fourth Amendment's passage.'" *Steagald v. United States*, 451 U.S. 204, 217 n.10 (1981) (citation omitted). Instead, in making its determinations as to what law enforcement practices are reasonable, the Court looks to the laws of the States and of the federal government.

Over the past century, virtually every State has enlarged the authority of law enforcement officers to allow warrantless arrests for misdemeanors not involving a breach of the peace. *See* William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 Mo. L. Rev. 771, 776-86 & nn. 10-22 (1993). Congress likewise has enacted numerous laws giving federal law enforcement personnel the same authority. *See, e.g.*, 18 U.S.C. § 3052 (FBI). *See also* American Law Institute, Model Code of Pre-Arraignment Procedure § 120.1 (1975). Under this Court's cases, this body of law demonstrates that warrantless arrests for misdemeanors not involving a breach of the peace are reasonable under the Fourth Amendment.

II. A. The Fourth Amendment does not prohibit warrantless arrests for "fine only" offenses committed in the arresting officer's presence. The Fourth Amendment's core mechanism for circumscribing the arrest authority of law enforcement officers is the requirement of probable cause. *See Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975); *Whren v. United States*, 116 S.Ct. 1769, 1776 (1996). When, as in this case, a citizen not only commits an offense in the presence of a police officer, but admits that he is in the course of committing the offense, *see* Pet.

App. 7a, the strongest possible case of probable cause is presented and no Fourth Amendment violation occurs as the result of an arrest.

B. 1. The ability of law enforcement officers to arrest for ordinance violations committed in their presence is essential to legitimate law enforcement. City and county ordinances, such as those violated by petitioner, are enacted and enforced pursuant to the police powers of local government in order to protect the public. These laws are no less essential to the public good simply because violations are punishable by fines rather than by a period of incarceration. Not only may such fines be substantial as they were in this case, *see* Pet. App. 7a, such offenses are often just as destructive of the fabric of urban life as those that are punishable by imprisonment.

2. Because arrests are costly and time-consuming for law enforcement personnel as well as for the arrestee, police officers and administrators will ordinarily prefer to issue a citation on the spot rather than to arrest the offender. There are, however, simply too many recurring situations in which a citation—even for a "fine only" offense—will not suffice to protect the public interest, or at times even the interest of the arrestee. For this reason the statutes and case law of numerous States authorize warrantless arrests for "fine only" ordinance violations committed in the arresting officer's presence. So do a number of federal statutes.

There are many circumstances in which the public interest necessitates warrantless arrests of persons committing "fine only" offenses in a law enforcement officer's presence. These include: where the arrest is necessary to ensure the cessation of the unlawful conduct, such as when the offender is mobile or transient; the refusal of the offender to sign a notice to appear at the hearing on the charges; the inability or refusal of the offender to produce identification to the arresting officer, or the pro-

duction by the offender of questionable identification; and where the offender poses a danger to himself or to others.

It is not possible to devise a constitutional prohibition on warrantless arrests for "fine only" offenses that would not "constitute an intolerable handicap for legitimate law enforcement." *Gerstein*, 420 U.S. at 113. Rather, this Court should leave this matter to be addressed by the States pursuant to their respective laws, as they have done.

ARGUMENT

I. THE FOURTH AMENDMENT DOES NOT PROHIBIT WARRANTLESS ARRESTS FOR MISDEMEANORS THAT DO NOT INVOLVE A BREACH OF THE PEACE

The Fourth Amendment does not prohibit warrantless arrests for misdemeanors that do not involve a breach of the peace. The ancient common law rule to the contrary has been enlarged by statute in virtually every State and by Congress. Moreover, this Court's Fourth Amendment cases are grounded in the recognition that "decisions in this area have not 'simply frozen into constitutional law those enforcement practices that existed at the time of the Fourth Amendment's passage.'" *Steagald v. United States*, 451 U.S. 204, 217 n.10 (1981) (quoting *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980)). As Justice Marshall wrote for the Court in *Steagald*,

> The common-law rules governing searches and arrests evolved in a society far simpler than ours is today. Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper.

451 U.S. at 217 n.10. The Fourth Amendment thus "must be interpreted 'in light of contemporary norms and conditions.'" *Id.* (quoting *Payton*, 445 U.S. at 591 n.33). *See also Tennessee v. Garner*, 471 U.S. 1, 13 (1985).

The core inquiry in every Fourth Amendment case is "reasonableness." *Whren v. United States*, 116 S.Ct. 1769, 1776 (1996); *Payton*, 445 U.S. at 585-86. In its case law analyzing the constitutionality of arrests, the Court has discerned contemporary norms and conditions, and thus made a determination of what law enforcement practices are reasonable, by studying the practices of the States and the determinations of Congress. *See United States v. Watson*, 423 U.S. 411, 418-24 (1976).

A review of state and federal law demonstrates that there is "virtual unanimity on this question" among the States, *Payton*, 445 U.S. at 600, which have enlarged the common law rule to permit warrantless arrests for misdemeanors that do not involve a breach of the peace. Further, Congress has enacted numerous statutes that authorize federal law enforcement officers to "make arrests without warrant for any offense against the United States committed in their presence," 18 U.S.C. § 3052, a grant of authority far broader than the common law. There is accordingly no basis for petitioner's suggestion that the Fourth Amendment incorporates the antiquated common law rule that limited warrantless arrests to misdemeanors involving a breach of the peace.

A. As this Court has repeatedly recognized, the common law power of arrest can be enlarged by statute. *See, e.g., Bad Elk v. United States*, 177 U.S. 529 (1900). Professor Schroeder recently undertook an exhaustive analysis of state law on warrantless arrests and concluded that the "breach of the peace requirement . . . has been abandoned in almost every American jurisdiction." William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 Mo. L. Rev. 771, 848 (1993).

With the "growth of organized police forces in the late nineteenth and early twentieth centuries, most American jurisdictions attempted to expand the common law arrest powers." *Id.* at 789. By the early 1920's, another commentator writes, "[s]tatutes and municipal charters . . . quite generally authorized an officer to arrest for any misdemeanor whether a breach of the peace or not, without a warrant, if committed in the officer's presence." Horace L. Wilgus, *Arrest Without A Warrant*, 22 Mich. L. Rev. 673, 705-06 (1924).

In the mid-1960's, yet another survey of the law of arrest concluded that "most modern statutes have enlarged the powers of arrest without warrant to extend to any offense committed in the presence of the arresting officer, including those not amounting to a breach of the peace." Edward C. Fisher, *Laws of Arrest* 181 (1967). This study further explained that while "'[a]t common law the right to arrest for a misdemeanor committed in the presence of the officer is confined to those offenses which amount to a breach of the peace . . . the distinction is of slight importance today.'" *Id.* (quoting 4 Am. Jur. *Arrest* § 26). Hence, it is no surprise that today not only has the breach of the peace requirement been abandoned by statute in virtually every American jurisdiction, but that "[r]ecently, the trend away from the common law rule has accelerated." Schroeder, 58 Mo. L. Rev. at 785.[2]

B. The determination of Congress, another important part of the Fourth Amendment calculus, *see Watson*, 423 U.S. at 423, has likewise been to expand the powers of federal law enforcement personnel to arrest for non-felony offenses not involving a breach of the peace. Numerous federal statutes grant federal officials the authority to "make arrests without warrant for any offense against the United States committed in their presence." 18 U.S.C.

[2] The statutory authority for these conclusions is collected in Schroeder, 58 Mo. L. Rev. at 777-86 nn. 10-22.

§ 3052 (FBI); *see also id.* § 3050(3) (Federal Bureau of Prisons); *id.* § 3053 (U.S. Marshals Service); *id.* § 3056 (c)(1)(C) (Secret Service); *id.* § 3061(a)(2) (U.S. Postal Service); *id.* § 3063 (Environmental Protection Agency); 16 U.S.C. § 1a-6(b)(1) (National Park Service); 26 U.S.C. § 7608(a)(3) (Internal Revenue Service); 40 U.S.C. § 212a (U.S. Capitol Police); 42 U.S.C. § 2456a (National Aeronautics and Space Administration); *id.* § 7270a (Strategic Petroleum Reserve). These statutes are "the expression of the judgment of Congress that such an arrest is 'reasonable.'" *Payton*, 445 U.S. at 590.

This statutory expansion of arrest authority is fully supported by the American Law Institute, Model Code of Pre-Arraignment Procedure (1975).[3] The section of the Model Code that governs arrest without a warrant does not require a breach of the peace for a warrantless arrest for a misdemeanor or petty misdemeanor, but rather requires only that such an offense be committed "in the officer's presence." ALI Model Code § 120.1(1)(c) (*quoted in Watson*, 423 U.S. at 422 n.11).[4] "'The Code thus adopts the traditional and almost universal standard for arrest without a warrant.'" *Watson*, 423 U.S. at 422 (quoting Commentary to Model Code § 120.1, at 289 (footnotes omitted)).

Notwithstanding the foregoing, petitioner asserts that the law and practice in "the overwhelming majority of states" are "contemporary translations of the common law rule." Pet. Br. 13-14. Petitioner is in error. The law

[3] On the history and importance of the ALI Model Code, *see Watson*, 423 U.S. at 422.

[4] The Model Code further expands the common law rule by authorizing arrests for misdemeanors not committed in the arresting officer's presence "if the officer has reasonable cause to believe that such person . . . (i) will not be apprehended unless immediately arrested; or (ii) may cause injury to himself or others or damage to property unless immediately arrested." Model Code § 120.1 (*quoted in Watson*, 423 U.S. at 422 n.11).

of virtually every State, federal law, and the ALI Model Code all conclusively establish that any common law rule requiring a breach of the peace for a warrantless misdemeanor arrest has long since been abandoned throughout the country. Under this Court's cases, this uniform body of law demonstrates that warrantless arrests for misdemeanors not involving a breach of the peace are reasonable and thus not proscribed by the Fourth Amendment.

II. THE FOURTH AMENDMENT DOES NOT PROHIBIT WARRANTLESS ARRESTS FOR "FINE ONLY" OFFENSES COMMITTED IN THE ARRESTING OFFICER'S PRESENCE

A. Commission of an Offense in the Arresting Officer's Presence Is the Strongest Possible Case of Probable Cause

Petitioner and his *amici* rightly decry the prospect that the police be given "vast and unchecked power." ACLU Br. *Am. Cur.* 16. In this regard the ACLU observes that "[i]t is by now familiar history that the framers' dismay at statutes granting general prerogatives to search and seize (like the writs of assistance) was one of the principal motivating factors, not only for the Revolution, but for the creation of the Fourth Amendment itself." *Id.* at 16 (citing Nelson B. Lasson, *The History and Development of the Fourth Amendment* 13-78 (1937)).

More to the point, however, "[t]here is no historical evidence that the Framers or proponents of the Fourth Amendment, outspokenly opposed to the infamous general warrants and writs of assistance, were at all concerned about warrantless arrests by local constables and other peace officers." *Watson*, 423 U.S. at 429 (Powell, J., concurring) (citing Lasson, *History of the Fourth Amendment*, at 79-105). Indeed, "the Second Congress' passage of an Act authorizing such arrests so soon after

the adoption of the Fourth Amendment itself underscores the probability that the constitutional provision was intended to restrict entirely different practices." *Id.* at 429-30. *See also id.* at 420-21 (majority opinion).

The Fourth Amendment responds to the problem of unbounded police discretion to arrest by its requirement of probable cause. To allow an arrest on some lesser basis than probable cause would " 'leave law-abiding citizens at the mercy of the officers' whim or caprice,' " *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975) (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)), the precise evil posed by the infamous writs of assistance. *See also Whren*, 116 S. Ct. at 1776 ("*probable cause*" is the "*traditional justification*" for "police intrusion"). Thus, *Gerstein* elaborates,

> The standard for arrest is probable cause, defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.' This standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime.

420 U.S. at 111-12 (citations omitted). Under this standard, "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Id.* at 113-14. *Cf. Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993) (under "plain-view" doctrine, "if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant") (citations omitted).

It is obvious that when, as in this case, a citizen not only commits an offense in the presence of an officer but admits to the officer that he is in the course of committing the offense, *see* Pet. App. 7a, there is not the remotest possibility that a " 'law-abiding citizen[]' " will be left " 'at the mercy of the officers' whim or caprice.' " *Gerstein*, 420 U.S. at 112 (citations omitted). On the contrary, the admission by a citizen to a police officer that he is in the course of committing an offense presents the strongest possible case of probable cause. And while "in principle every Fourth Amendment case, since it turns upon a 'reasonableness' determination, involves a balancing of all relevant factors . . . [w]ith rare exceptions . . . the result of that balancing is not in doubt where the search or seizure is based upon probable cause." *Whren*, 116 S. Ct. at 1776.

In *Whren* the Court elaborated on the "rare exceptions" that require such balancing.

> Where probable cause has existed, the only cases in which we have found it necessary actually to perform the 'balancing' analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests—such as, for example, seizure by means of deadly force, unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body.

Id. at 1776-77 (citations omitted).

This case does not remotely resemble any of these "rare exceptions." [5] Indeed, the facts of this case have much in

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[5] Although *Payton* and *Welsh v. Wisconsin*, 466 U.S. 740 (1984), involved warrantless entries into a home, those entries were non-consensual. *See Payton*, 445 U.S. at 576, 587; *Welsh*, 466 U.S. at 743 n.1 (assuming entry to be non-consensual). In this case, by contrast, not only was the arrest made at petitioner's place of business rather than his home, the entry was justified by the arrest

common with those of *Whren* itself, in which officers had observed the plaintiff committing a "civil traffic violation." *Id.* at 1771. Despite the ubiquity of such violations, the *Whren* Court emphasized that it was "aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement." *Id.* at 1777.

Petitioner's commission of, and admission to, an offense in the presence of the arresting officers obviate the need for any further Fourth Amendment analysis in this case. *See Whren*, 116 S. Ct. at 1776. Even if the Court concludes that further balancing is necessary, however, the Fourth Amendment does not prohibit warrantless arrests for "fine only" ordinance violations committed in the presence of a law enforcement officer. Such a holding "would constitute an intolerable handicap for legitimate law enforcement." *See Gerstein*, 420 U.S. at 113; *see also Watson*, 423 U.S. at 431 (Powell, J., concurring).

B. The Ability to Arrest for Ordinance Violations Committed in the Presence of Arresting Officers Is Essential to Legitimate Law Enforcement

In some Fourth Amendment cases the Court concludes that it is necessary to engage in a detailed "balancing of

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warrant the officers were serving on one of petitioner's employees, who listed petitioner's office as his place of business. *See* Resp. Br. 1-2.

Given the text of the Fourth Amendment, this Court has always treated cases involving non-consensual searches or arrests within the home as unique. *See Payton*, 445 U.S. at 585 ("the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed' ") (citation omitted); *see also id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)) (Fourth Amendment is directed at "invasions on the part of the government . . . of the sanctity of a man's home and the privacies of life").

all relevant factors" in order to determine whether the Fourth Amendment standard of "reasonableness" has been met. *Whren*, 116 S. Ct. at 1776. Balancing the harm to the arrestee against the needs of effective law enforcement demonstrates that warrantless arrests for offenses committed in the presence of the arresting officer are not prohibited by the Fourth Amendment.

1. *Local Government Ordinances, Including Those Punishable by Fines, Are Enacted And Enforced to Protect the Public*

The Arlington Heights ordinances which made it unlawful for petitioner to operate his telephone solicitation business without a license, Pet. App. 2a & n.1 (citing Village of Arlington Heights Code of Ordinances §§ 9-201, 14-3002), are a classic exercise of the police power. As Justice Holmes explained,

> the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.

Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911). "Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs." *Berman v. Parker*, 348 U.S. 26, 32 (1954).[6]

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[6] As Professor Wilgus noted as early as 1924,

> It is impossible to classify or enumerate the great number of . . . misdemeanors or breaches of ordinances for which peace officers may arrest, without a warrant, if committed in their presence. They include violations of health and food regulations, Sunday travelling, or entertainments, nuisances on streets or sidewalks, or loitering, or meetings on same, cruelty

Nor are these concerns any less compelling merely because a violation of an ordinance may be punishable, at least in the first instance, by a monetary fine. Indeed, as attested to by this case, such fines can be considerable. *See* Pet. App. 7a ("By the time he was arrested, Ricci was facing a potential fine of tens of thousands of dollars."). And such offenses are no less destructive of the fabric of urban life merely because they involve what may at times be imprecisely referred to as "lesser" offenses.[7]

"[O]ne of the most important activities of local government is the regulation of trades and businesses." Osborne M. Reynolds, Jr., *Local Government Law* 503 (1982). The compelling purposes of such regulation "include protecting the public from fraudulent activity or price-gouging" and the protection of public health and safety through the licensing and regulation of food vendors. *Id.* at 504-09. Local governments also regulate trades and professions, particularly those involving public health and welfare (*e.g.*, barbering, cosmetology), and

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to animals, vagrancy, drunkenness, disturbances in school houses, or at elections. . . .

Wilgus, 22 Mich. L. Rev. at 706-07 (citations omitted).

Of course, with the passage of time and the increasing complexity of urban life, the specific ordinances on which the quality of life depends have in some instances changed. *See* Resp. Br. 35, 37 (citing numerous provisions of the Chicago Municipal Code setting forth "fine only" offenses).

[7] In Washington, D.C., for example,

> The city's rows of decapitated [parking] meters are not unlike the subway graffiti sociologist Nathan Glazer described 20 years ago in an essay for *The Public Interest*. Glazer wrote that graffiti imbues the passerby with "the inescapable knowledge that the environment he must endure for an hour or more a day is uncontrolled and uncontrollable, and that anyone can invade it to do whatever damage and mischief the mind suggests."

Stephanie Mencimer, "When Meters Expire," *Washington City Paper*, July 4, 1997, at 19.

safety (*e.g.*, contractors, electricians, plumbers). 3 C. Dallas Sands, *et al.*, *Local Government Law* § 15.08 (1996). They also license and regulate taxis, busses, and other vehicles for hire, *id.* § 15.12, and merchandising, including auctions, auctioneers, retailers, peddlers, hucksters, other transient merchants, and used car and other secondhand dealers. *Id.* § 15.16. "[D]oor-to-door salespersons, solicitors, canvassers, etc." also engage in activities whose control "is often thought necessary to the health and well-being of the community." Reynolds, *Local Government Law* at 511. *See Breard v. City of Alexandria*, 341 U.S. 622 (151).[8]

Today, door-to-door sales has been replaced by telemarketing, with all of its potential for harassment, fraud and exploitation of the trusting, unsophisticated, or elderly.[9] In this case, for example, as petitioner acknowledges, the Arlington Heights Police Department had, prior to his arrest, "received complaints about the business practices of petitioner's firm," Pet. 2, including complaints "about 'high pressure to contribute . . . on behalf of the

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[8] In *Breard*, the Court emphasized the important public purposes served by an ordinance regulating door-to-door sales:

> Door-to-door canvassing has flourished increasingly in recent years. . . . Unwanted knocks on the door by day or night are a nuisance, or worse, to peace and quiet. . . .
>
> [R]esponsible municipal officers have sought a way to curb the annoyances.

341 U.S. at 626-27.

[9] *See, e.g.*, *AARP Plots New Measures to Foil Telemarketing Fraud*, Orange County (Cal.) Register, Feb. 19, 1998, at A17; *Telemarketing Fraud Rings US Huge Losses*, Rocky Mountain News, Nov. 21, 1997, at 5B (noting study of Department of Justice estimating annual losses to citizens of U.S. and Canada from telemarketing fraud at $40 billion per year; "the swindlers frequently prey on the elderly and . . . fraud accounts for as much as 10 percent of the industry").

Arlington Heights Police Department'" when he was in fact soliciting money for an officers' association. *Id.* (quoting Pet. App. 20a). The essential first step in effectively regulating the business practices of "telemarketers" is to require them to obtain a license, like any other business.[10]

2. *Law Enforcement Officers Must Have the Ability to Make Warrantless Arrests for "Fine Only" Offenses Committed in Their Presence*

Any arrest of an offender is a serious intrusion on the arrestee, and should not be undertaken lightly. Indeed, arrests are costly and time-consuming for law enforcement personnel as well as for the arrestee. *See* ALI Model Code § 120.2 note at 16. Police officers and administrators will ordinarily prefer to issue a citation on the spot rather than to arrest the offender, if circumstances clearly indicate that a citation will suffice both to enforce the law and to assure the arrestee's appearance at subsequent judicial proceedings on the charges. *See* ALI Model Code § 120.2(4) (encouraging "the maximum use of citations, so that persons believed to have committed offenses will be taken into custody only when necessary in the public interest").[11]

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[10] "Regulatory authority extends to the requirement that persons and activities subject to regulation . . . keep detailed records of their operations reasonably related to the effectuation of legitimate police power objectives." Sands, *Local Government Law* § 14.37. The purpose of this and other license-related requirements is "protection of the consumer from abuses that might occur as a result of incompetent or unethical practices." *Id.* § 15.02.

[11] Although petitioner characterizes his arrest as a "full custodial arrest," Pet. 3, it was less intrusive than most arrests. Petitioner was not handcuffed and did not undergo an inventory search or fingerprinting. At the station he was not placed in a cell but rather in an interview room where members of the public, such as witnesses and crime victims, wait to speak to investigators. He was

There are, however, simply too many recurring situations—arising in the context of "fine only" offenses just as in other contexts—in which a citation will not suffice to protect the public interest, or at times even the interest of the arrestee. For this reason, a prohibition of such arrests would be "an intolerable handicap for legitimate law enforcement," *Gerstein*, 420 U.S. at 113, and would undermine the balancing of interests at the heart of the Fourth Amendment's reasonableness inquiry.

The necessity for the ability to make such arrests is amply demonstrated by the existence of numerous state laws that authorize warrantless arrests for ordinance violations committed in the arresting officer's presence. Of particular relevance to this case, "under Illinois law a police officer is authorized to arrest those found violating municipal ordinances that provide for only a fine and no incarceration time." *Mustfov v. Rice*, 663 F. Supp. 1255, 1269 (N.D. Ill. 1987) (citing Ill. Rev. Stat., ch. 110A, para. 528; *People v. Edge*, 94 N.E.2d 359, 363 (Ill. 1950); Chicago Municipal Code § 11-25). *See also, e.g.*, Cal. Penal Code § 836(a)(1) (warrantless arrest authorized when arresting officer "has reasonable cause to believe that the person . . . has committed a public offense in the officer's presence"); *id.* § 15.3 (defining "public offense" as a violation of law punishable by fine); *id.* § 853.6 (enumerating situations in which officer should arrest offender, rather than issuing a citation);[12] Fla.

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at the station for approximately one hour and did not believe he was under arrest until shortly before his release. *See* Resp. Br. 9-10. Petitioner's arrest was thus less intrusive than what this Court sanctioned in *Gerstein* when it upheld "a brief period of detention [necessary] to take the administrative steps incident to" an arrest based on probable cause. 420 U.S. at 114.

[12] Although Cal. Penal Code § 853.6 encourages the issuance of citations for persons arrested for "an offense declared to be a misdemeanor, including a violation of any city or county ordinance,"

Stat. Ann. § 901.15(1) (warrantless arrest authorized when arrestee has "violated a municipal or county ordinance in the presence of the officer"); Mich. Comp. Laws § 764.15(a) (authorizing warrantless arrest by peace officer for "ordinance violation committed in the peace officer's presence"); Minn. Stat. Ann. § 629.34 subd.1(c) (authorizing warrantless arrest "when a public offense has been committed or attempted in the officer's or constable's presence"); *State v. Sellers*, 350 N.W.2d 460, 462 (Minn. Ct. App. 1984) (defining "public offense" to include violation of municipal ordinances " 'punishable by fine *or* imprisonment' ") (citation omitted); Mo. Rev.

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that section goes on to enumerate the numerous situations in which the offender should not be cited and released. These include:

> (1) The person arrested was so intoxicated that he or she could have been a danger to himself or herself or to others.
>
> (2) The person arrested required medical examination or medical care or was otherwise unable to care for his or her own safety.
>
> (3) The person was arrested under one or more of the circumstances listed in [Vehicle Code] Sections 40302 [failure to provide "satisfactory evidence of . . . identity" or "give a written promise to appear"] and 40303 [unsafe operation of vehicle or riding bicycle under the influence]. . . .
>
> (5) The person could not provide satisfactory evidence of personal identification.
>
> (6) The prosecution of the offense or offenses for which the person was arrested, or the prosecution of any other offense or offenses, would be jeopardized by immediate release of the person arrested.
>
> (7) There was a reasonable likelihood that the offense or offenses would continue or resume, or that the safety of persons or property would be imminently endangered by release of the person arrested.
>
> (8) The person arrested demanded to be taken before a magistrate or refused to sign the notice to appear.
>
> (9) There is reason to believe that the person would not appear at the time and place specified in the notice. The basis for this determination shall be specifically stated.

Cal. Penal Code § 853.6.

Stat. § 544.216 (authorizing warrantless arrests by state, county or municipal law enforcement officer of "any person the officer sees violating or who such officer has reasonable grounds to believe has violated any law of this state, including a misdemeanor or infraction, or has violated any ordinance over which such officer has jurisdiction"); N.H. Rev. Stat. Ann. § 594:10.I(a) (authorizing warrantless arrest of person whom peace officer "has probable cause to believe . . . has committed a misdemeanor or violation in his presence"); N.Y. Crim. Proc. Law § 140.10(a) (authorizing warrantless arrest of a person for "[any] offense when [the officer] has reasonable cause to believe that such person has committed such offense in his presence"); N.Y. Penal Law § 10.00.1 (defining an "offense" as "conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state"); Ohio Rev. Code Ann. § 2935.03 (authorizing warrantless arrest by state or local law enforcement officer of "a person found violating . . . a law of this state, an ordinance of a municipal corporation, or a resolution of a township"); Tex. Crim. Proc. Code Ann. § 14.01(b) ("A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view."); *Howard v. State*, 932 S.W.2d 216, 217 (Tex. App. 1996) (ordinance violation is an "offense" under Texas statute authorizing warrantless arrests).[13]

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[13] According to the ACLU (Br. *Am. Cur.* at 15 & n.17), "eight states' statutory schemes appear to . . . categorically prohibit[] custodial arrests for fine-only offenses." Qualification of this statement is in order for at least three of those eight States.

In Pennsylvania, for example, Pa. Stat. Ann. tit. 53, § 13349 and Pa. R. Crim. P. tit. 42, Rule 6002(a) confer upon the Philadelphia police the authority to arrest for ordinance violations committed in their presence. *See In re William M.*, 655 A.2d 158 (Pa. Super. Ct.) (upholding warrantless arrest of juvenile for curfew violation), *appeal denied*, 666 A.2d 1058 (Pa. 1995). *See also Com-*

The pressing needs of law enforcement have led to the adoption of the foregoing laws and others like them, including at the federal level.[14] These laws demonstrate why

monwealth v. Williams, 568 A.2d 1281, 1284 (Pa. Super. Ct. 1990) (borough police have authority to make warrantless arrests for violation of "'any ordinances of said borough for the violation of which a fine or penalty is imposed'") (quoting Pa. Stat. Ann. tit. 53, § 46121).

Alaska Stat. §§ 12.25.035 and 12.25.180 authorize warrantless arrests for ordinance violations and infractions, the latter when the person "does not furnish satisfactory evidence of identity; or . . . refuses to accept the citation or to give a written promise to appear." *Id.* § 12.25.180(b)(2).

Under Alabama law, "[p]olice officers may arrest any person without a warrant, on any day and at any time, for the violation of a City ordinance committed in their presence." *Hood v. City of Bessemer*, 404 So.2d 710, 715 (Ala. Crim. App. 1980) (collecting cases), *aff'd*, 404 So.2d 717 (Ala. 1981). *See also* Ala. R. Crim. P. 4.1(a)(1)(ii) (authorizing warrantless arrest for "[a]ny offense" committed in "the officer's presence or view"); Ala. Code § 13A-1-2(1) (defining "offense" as "[c]onduct for which a sentence to a term of imprisonment . . . or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state"); *Moon v. State*, 262 So.2d 615 (Ala. Crim. App. 1972); Birmingham (Ala.) City Code § 9-2-25 (authorizing all Birmingham police officers to "arrest without warrant any person who, in their presence, commits any violation of this code or other city ordinance or any other law").

Insofar as the ACLU's characterization of the remaining five States—Delaware, Kentucky, Maine, Rhode Island, and South Dakota—is correct, their laws simply illustrate the fundamental point made by the Fourth Circuit many years ago:

> The fourth amendment protects individuals from unfounded arrests by requiring reasonable grounds to believe a crime has been committed. The states are free to impose greater restrictions on arrests, but their citizens do not thereby acquire a greater federal right.

Street v. Surdyka, 492 F.2d 368, 372 (4th Cir. 1974).

[14] Federal statutes grant federal law enforcement personnel authority to make warrantless arrests for violations of federal law punishable only by monetary penalties. For example, Chapter 16

a ruling by this Court that the Fourth Amendment prohibits warrantless arrests for "fine only" ordinance violations would unduly interfere with legitimate law enforcement. *Amici* respectfully submit that if municipal governments are to bear the chief responsibility for enacting and enforcing laws to protect the "great public needs" of our cities, towns, and counties, *see Noble State Bank*, 219 U.S. at 111, they must have the concomitant ability to enforce these laws. As already noted, there are strong fiscal and logistical disincentives against warrantless arrests; nonetheless, there are many recurring situations in which the public interest necessitates warrantless arrests of persons committing offenses in the presence of the arresting officer.[15]

First are situations in which an arrest is necessary to ensure the cessation of an ongoing violation. *See* Cal. Penal Code § 853.6(7) (authorizing warrantless arrest where there is "reasonable likelihood that the offense or offenses would continue or resume"). Besides petitioner's case, *see* Pet. App. 7a, there are a wide range of other situations—particularly those involving mobile or transient offenders—where meaningful enforcement of important municipal laws may require the arrest of the offender. For example, a person unlawfully blaring mes-

of Title 16 of the U.S. Code authorizes an official of the Coast Guard, Department of Commerce, or Customs Service to arrest, "with or without a warrant or other process, . . . any persons . . . committing in his presence or view a violation of this chapter or the regulations issued thereunder," 16 U.S.C. § 959(d), notwithstanding that such violations are punishable only by fines. *Id.* § 957. Title 16A, which implements the Atlantic Tuna Conventions, authorizes warrantless arrests even though violations of its provisions are punishable only by civil penalties. *See* 16 U.S.C. §§ 971e & 971f.

[15] For these reasons, a ruling that the Fourth Amendment prohibits warrantless arrests for "fine only" offenses might well lead state and local legislatures to add periods of incarceration to the possible penalties for violations of these laws.

sages or music from a sound truck can, if simply cited and released, readily move to another part of a large urban area and resume the violation. This is also true of persons vending food from a cart without a license, selling prohibited materials such as fireworks or phony watches from a cart or an improvised stand, or conducting games of chance on a sidewalk. It may likewise be necessary in order to enforce the law with respect to persons who operate unlicensed cabs, delivery trucks, tow trucks, or vans for hire. *See Mustfov*, 663 F. Supp. at 1258-59.

Another category of cases arises when the offender is cited but "refuses to sign a promise to appear." ALI Model Code § 120.1 commentary at 305. The offender "should then be arrested and taken to the police station for further proceedings." *Id.* This situation includes, but is not limited to, those instances in which the offender is a motorist from out of state. *See, e.g.*, Cal. Veh. Code § 40302 (offender to be arrested if he "refuses to give [the officer] his written promise to appear in court"). *See also* Cal. Penal Code § 853.6(9).[16]

Another important—and growing—category of cases are those in which the offender has no identification to furnish to the officer, furnishes identification which the officer has reason to believe is not genuine, or flatly refuses to furnish any identification. *See, e.g.*, Cal. Penal Code § 853.6(5). In these cases the mere issuance of a citation is meaningless, inviting repeated violations and contempt for the law.

[16] For example, the City of Milwaukee, near the Chicago metropolitan area, has recently had great success fostering urban revitalization by sponsoring a variety of street fairs. At the same time, the City Code makes it an offense, punishable only by a fine, to possess a small amount of marijuana for personal use. *See* Milwaukee Code of Ordinances § 106-38. Clearly the City would be hard pressed to enforce this ordinance against persons from out of state unless the Milwaukee police could invoke the power of arrest.

Nor will such incidents arise only when a violator simply lacks identification; organized groups wishing to publicize their cause may engage in unlicensed parades or demonstrations, purposely blocking city streets or other areas in the hope of being cited. They may well wish to carry things one step further and heighten media attention by refusing to provide identification to law enforcement officers, thereby leaving the police no choice but to arrest them if respect for the law is to be maintained.

Yet another category involves offenses in which the violator poses a danger either to himself or to others, as, for example, if he is intoxicated or under the influence of drugs. *See* Cal. Penal Code § 853.6(1); Cal. Vehicle Code § 40303 (authorizing warrantless arrest for "riding a bicycle while under the influence of an alcoholic beverage or any drug"). An arrest is also necessary when the offender abusively resists issuance of a citation. *See* ALI Model Code § 120.2 commentary at 304 (arrest necessary for otherwise citable offense where officer cannot rely on the "voluntary cooperation" of the offender).

The common law (on which petitioner and his *amici* so heavily rely) has evolved similarly. Contemporary English law authorizes warrantless arrests for petty misdemeanors or other minor offenses for reasons that mirror many of those in American law. These include: (1) that the name of the "relevant person[17] is unknown to, and cannot be readily ascertained by, the constable"; (2) that the constable has "reasonable grounds for doubting whether a

[17] English law defines the "relevant person" as "any person whom the constable has reasonable grounds to suspect of having committed or having attempted to commit the offense or of being in the course of committing or attempting to commit it." *Halsbury's Laws of England* (4th ed. 1990) para. 707 n.2 (citing Police and Criminal Evidence Act 1984 sec. 25(2)). English common law is thus more permissive than the law of many American jurisdictions in that it does not have an "in presence" requirement for a warrantless arrest.

name furnished by the relevant person as his name is his real name"; (3) that (a) the relevant person has "failed to furnish a satisfactory address for service; or (b) the constable has reasonable grounds for doubting whether an address furnished by the relevant person is a satisfactory address for service"; (4) that the constable has "reasonable grounds for believing that arrest is necessary to prevent the relevant person (a) causing physical injury to himself or any other person; (b) suffering physical injury; (c) causing loss of or damage to property; (d) committing an offence against public decency; or (e) causing an unlawful obstruction of the highway"; or (5) that the constable has "reasonable grounds for believing that arrest is necessary to protect a child or other vulnerable person from the relevant person." *Halsbury's Laws of England*, para. 707 (footnotes omitted).

The ALI Model Code of Pre-Arraignment Procedure—which seeks to balance individual rights and the needs of law enforcement, *see id.* at xiii-xiv—expressly declines to adopt a rule prohibiting warrantless arrests for "petty misdemeanors" committed in the presence of the arresting officer. While stating a preference for the "maximum" use of citations, *see id.* § 120.2(4), the drafters of the Code nonetheless recognized that in many situations it will be "necessary in the public interest" that persons who commit offenses be arrested and taken into custody rather than cited on the spot and released. *Id.* The drafters thus concluded that "[i]t is extremely difficult in drafting a statute to make determinations that citations shall always be used for particular crimes." *Id.* commentary at 305.[18]

[18] The drafters of the Model Code give the following examples of circumstances in which a warrantless arrest may be "necessary in the public interest":

> A person may be arrested for a minor offense under circumstances which suggest that identification procedures might identify him as a person wanted for a more serious offense. Persons who habitually ignore summonses and citations in traffic cases are often discovered when arrested on a minor offense and fingerprinted. In other cases the most effective way of avoiding a potentially explosive situation on the street as the result of an arrest for a minor offense may be to transport the arrested person quickly, to a police station. In still other cases the arrested person may be intoxicated, or wounded, or otherwise unfit to be left on the street with a citation in his hand.

Id. commentary at 305-06.

It is no solution to suggest, as does the ACLU, that warrantless arrests are permissible only when there are "exigent circumstances." ACLU Br. 22-23. This concession, helpful insofar as it acknowledges that the Fourth Amendment does not prohibit warrantless arrests for fine only offenses, is patently insufficient to meet the needs of law enforcement. *See, e.g., Payton*, 445 U.S. at 583 ("exigent circumstances" are limited to "emergency or dangerous situation[s]"). Another of petitioner's *amici* highlights the insufficiency of the ACLU's proposed standard by urging that warrantless arrests be permitted in cases "involving a breach of the peace or a threat to public health or safety." National Association of Criminal Defense Lawyers Br. *Am. Cur.* 16.

The inability of petitioner's own *amici* to agree demonstrates the impossibility of devising a workable constitutional standard that would not "intolerabl[y] handicap . . . legitimate law enforcement." *Gerstein*, 420 U.S. at 113. It also demonstrates the wisdom of leaving this matter to be addressed by the States pursuant to their respective laws which, as indicated above, they have done.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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